



# Chapter 1

## Purpose and Need

<b>CHAPTER 1</b>	<b>Purpose and Need .....</b>	<b>1</b>
<b>1.0</b>	<b>PURPOSE AND NEED.....</b>	<b>1</b>
1.1	Introduction.....	1
1.1.1	Summary of the Proposed Action .....	1
1.1.2	Project Location.....	2
1.1.3	Summary of Eastern North Pacific Gray Whale Status .....	5
1.1.4	Summary of Makah Tribe's Historic Whaling Tradition.....	5
1.2	Legal Framework.....	6
1.2.1	National Environmental Policy Act.....	6
1.2.2	Treaty of Neah Bay and the Federal Trust Responsibility.....	7
1.2.2.1	The Stevens Treaties .....	8
1.2.2.2	Scope of the Fishing Right under the Stevens Treaties .....	9
1.2.2.3	Limitations on the Exercise of Treaty Rights.....	10
1.2.2.3.1	State Regulation.....	10
1.2.2.3.2	Federal Regulation.....	11
1.2.2.4	The Federal Trust Responsibility .....	11
1.2.3	Marine Mammal Protection Act .....	12
1.2.3.1	Section 2 – General Purposes and Policies.....	12
1.2.3.2	Section 101(a) – Take Moratorium .....	13
1.2.3.3	Section 101(a)(3)(A) – Waiver of the Take Moratorium .....	13
1.2.3.3.1	Step 1 – Initial Waiver Determination.....	14
1.2.3.3.2	Step 2 – Formal Rulemaking on the Record.....	15
1.2.3.3.3	Step 3 – Final Waiver Determination .....	16
1.2.3.3.4	Step 4 – Permit Authorizing Take .....	17
1.2.3.4	Application of the MMPA to Makah Whaling.....	17
1.2.4	Whaling Convention Act .....	19
1.2.4.1	International Whaling Governance under the ICRW .....	19
1.2.4.1.1	Functions and Operating Procedures of the IWC .....	19
1.2.4.1.2	IWC Commercial Whaling Moratorium.....	20
1.2.4.1.3	IWC Aboriginal Subsistence Whaling .....	21
1.2.4.1.4	United States' IWC Interagency Consultation .....	23
1.2.4.2	National Whaling Governance under the WCA.....	24
1.2.4.2.1	United States' Acceptance or Rejection of IWC Regulations .....	24
1.2.4.2.2	National Prohibition of Commercial Whaling.....	24
1.2.4.2.3	National Aboriginal Subsistence Whaling .....	25
1.2.4.3	Application of the WCA to Makah Whaling.....	26
1.3	Purpose and Need for Action.....	27
1.3.1	Purpose for Action.....	27

## Table of Contents (continued)

1.3.2 Need for Action .....	27
1.3.3 Decisions to be Made.....	27
1.4 Background and Context.....	28
1.4.1 Summary of Aboriginal Subsistence Whaling Catch Limits .....	28
1.4.1.1 Worldwide Catch Limits .....	28
1.4.1.2 United States Catch Limits.....	28
1.4.1.2.1 Relevant Overview of Requests for Bowhead Whales on Behalf of Alaska Eskimos .....	29
1.4.1.2.2 Overview of Requests for ENP Gray Whales on Behalf of the Makah .....	30
1.4.2 Summary of Recent Makah Whaling — 1998 through 2007.....	36
1.4.3 Other Environmental Assessments and Court Decisions Informing this Action.....	41
1.5 Scoping and the Relevant Issues.....	42
1.5.1 Scoping Process .....	42
1.5.1.1 Internal Scoping .....	43
1.5.1.2 Public Scoping.....	43
1.5.1.2.1 Public Comment Periods and Meetings.....	43
1.5.1.2.2 Other Public Scoping.....	45
1.5.2 Concerns Identified During Scoping .....	45
1.5.2.1 Water Quality .....	45
1.5.2.2 Marine Habitat and Species.....	46
1.5.2.3 ENP Gray Whales .....	46
1.5.2.4 Other Wildlife Species .....	46
1.5.2.5 Economics .....	46
1.5.2.6 Environmental Justice .....	46
1.5.2.7 Social Environment .....	46
1.5.2.8 Cultural Resources .....	47
1.5.2.9 Ceremonial and Subsistence Resources .....	47
1.5.2.10 Noise.....	47
1.5.2.11 Aesthetics .....	47
1.5.2.12 Transportation .....	47
1.5.2.13 Public Services .....	47
1.5.2.14 Public Safety.....	47
1.5.2.15 Human Health.....	48
1.5.2.16 Concerns not Specifically Related to a Resource Area .....	48
1.6 Relationship to Other Treaties, Laws, Regulations, Policies, and Processes.....	48
1.7 Organization of this EIS.....	51

## List of Tables

Table 1-1. Summary of the Makah's Proposed Action .....	2
Table 1-2. Schedule and Location of Public Scoping Meetings.....	44
Table 1-3. International, National, State, and Tribal Treaties, Laws, Regulations, Policies, and Processes that may be Required for Makah Whaling.....	49

## List of Figures

Figure 1-1 Project Area .....	4
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## 1.0 PURPOSE AND NEED

### 1.1 Introduction

#### 1.1.1 Summary of the Proposed Action

The Makah Indian Tribe (Makah or Tribe) proposes to resume limited hunting of eastern North Pacific (ENP) gray whales (*Eschrichtius robustus*; otherwise referred to in this chapter as ‘gray whales’ and ‘whales’) in the coastal portion of the Tribe’s usual and accustomed fishing grounds (U&A), off the coast of Washington State, for ceremonial and subsistence purposes. The Tribe proposes to harvest up to 20 whales over a five-year period, with no more than five gray whales harvested in any single year. This proposal is in accordance with the current five-year catch limit set by the International Whaling Commission (IWC) for the ENP gray whale stock of 620 whales total, with no more than 140 harvested per year. Both the annual and five-year totals are allocated between the United States and the Russian Federation by a separate bilateral agreement. The Tribe’s proposal also includes measures intended to limit the number of whales that may be struck in any year, avoid the intentional harvest of gray whales identified as part of the Pacific Coast Feeding Aggregation (PCFA), limit the annual harvest of PCFA whales based on the abundance of a subset of PCFA whales, ensure that the hunt is as humane as practicable, and protect public safety. This EIS uses the term ‘hunt’ to include all activities associated with approaching, striking, killing, and landing whales, and the term ‘harvest’ to mean killing and successfully landing whales.

The 1855 Treaty of Neah Bay expressly secures the Makah Tribe’s right to hunt whales. To exercise that right under the Ninth Circuit Court of Appeals decision in *Anderson v. Evans* (2004) however, the Makah must obtain authorization from the National Oceanic and Atmospheric Administration’s (NOAA’s) National Marine Fisheries Service (NMFS). Two statutes govern any authorization: the Marine Mammal Protection Act (MMPA) (16 United States Code [USC] 1361 et seq.) and the Whaling Convention Act (WCA) (16 USC 916 et seq.). Specifically, to authorize Makah gray whale hunting, NMFS must perform the following actions:

- Waive the moratorium prohibiting take of marine mammals under Section 101(a)(3)(A) of the MMPA.
- Promulgate regulations implementing the waiver and governing the hunts in accordance with Section 103 of the MMPA.
- Issue any necessary permits to the Makah under Section 104 of the MMPA.

- Enter into a cooperative agreement with the Tribe for co-management of any gray whale hunt and publish any relevant aboriginal subsistence whaling quotas under the provisions of the WCA.

In February 2005 the Makah Tribe formally requested waiver of the take moratorium under the MMPA to hunt gray whales. To assist in its MMPA and WCA determinations, NMFS is preparing this environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) as the lead agency reviewing this action (42 USC 4321 et seq.). See Section 1.2, Legal Framework, for more detail.

Table 1-1 contains certain aspects of the Makah's proposed action, with additional description in Chapter 2, Alternatives.

**TABLE 1-1. SUMMARY OF THE MAKAH'S PROPOSED ACTION**

Species restrictions	Hunt ENP gray whales only.
Age/sex restrictions	Prohibit hunting of calves or whales accompanied by calves.
Number restrictions	Harvest up to 20 whales in a five-year period, with a maximum of 5 whales harvested, 7 struck, and 3 struck and lost per calendar year. Reduce numbers of harvested, struck, and struck and lost whales as necessary in accordance with United States obligations under the International Convention for the Regulation of Whaling (ICRW), or to prevent the ENP gray whale stock from falling below optimum sustainable population (OSP) levels under the MMPA. Cease hunting in any year if the number of harvested whales exceeds an allowable bycatch level based on matches in the National Marine Mammal Laboratory's photographic identification catalog for PCFA gray whales.
Area restrictions	Hunt within the coastal portion of the Makah U&A, excluding the Strait of Juan de Fuca. Prohibit hunting within 200 yards of Tatoosh Island and White Rock during May to protect nesting seabirds.
Timing restrictions	Prohibit hunting from June 1 through November 30 during any calendar year to avoid intentional harvest of whales feeding off the coast of Washington during the summer feeding period.
Method of hunt restrictions	Hunt using traditional methods, except for the mandatory use of a .50 caliber rifle to kill the whale.
Use restrictions	Limit use of whale products to ceremonial and subsistence purposes. Prohibit the commercial sale or offer for sale of any whale products, except for sale or offer for sale of traditional handicrafts made from non-edible whale parts within the United States.

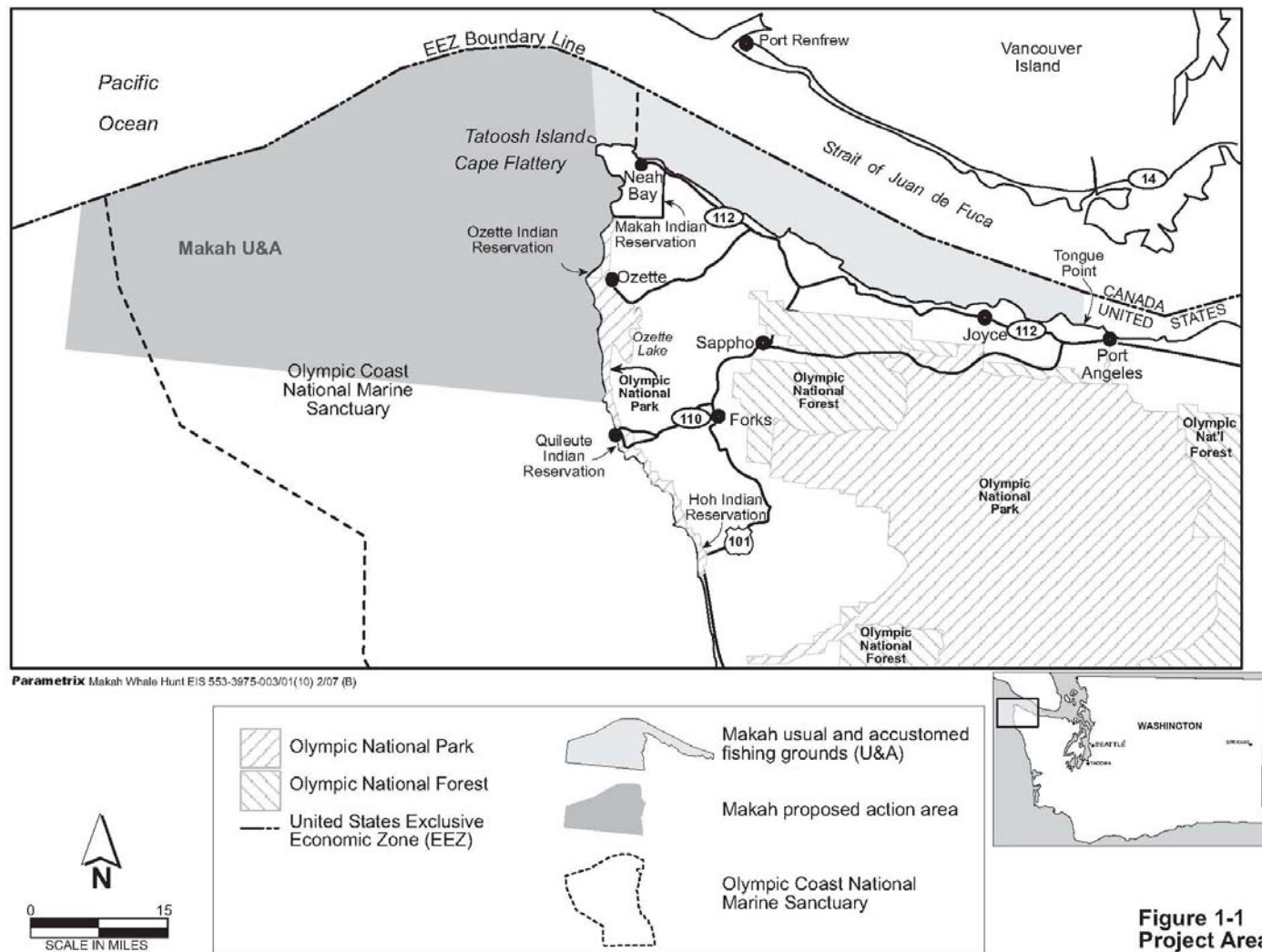
### 1.1.2 Project Location

The Makah Tribe proposes to resume gray whale hunting in the coastal portion of the Tribe's fishing U&A, as adjudicated by the Western District Court of Washington in *United States v. Washington* (1974 and 1985). The Makah U&A includes marine waters off the northwest coast of Washington State and the western portion of the Strait of Juan de Fuca (Figure 1-1). The Makah's proposed action area (Figure 1-1) is smaller than its adjudicated U&A because the Tribe proposes

1 to exclude the Strait of Juan de Fuca to address concerns about public safety and the effects of  
2 hunts on gray whales in the local area.

3 Figure 1-1 also shows the larger project area, which encompasses the entire Makah U&A and  
4 adjacent marine waters, as well as land areas with the potential to be affected by one or more of  
5 the project alternatives. The project area includes the following sites:

- 6 • Beaches where a gray whale may be landed and butchered
- 7 • Rocks and islands of the Washington Islands National Wildlife Refuges within the  
8 waters of the Olympic Coast National Marine Sanctuary (OCNMS or Sanctuary),  
9 where sanctuary resources such as seabirds and hauled-out marine mammals might  
10 be affected
- 11 • The Makah and Ozette Reservations and the community of Neah Bay, where many  
12 tribal members reside and public services are located
- 13 • Other shoreline areas that provide physical or visual access to the Makah's U&A  
14 (e.g., vantage points provided by the coastal strip of the Olympic National Park)



**Figure 1-1  
Project Area**

### 1.1.3 Summary of Eastern North Pacific Gray Whale Status

The ENP gray whale population migrates along the west coast of North America between Mexico and Alaska and is present year-round in the project area. The population sustained historical aboriginal hunting by natives in present-day Russia, Alaska, British Columbia, and Washington State for many centuries, but commercial whaling in the late 1800s and early 1900s decimated the population. Due to a suite of international and national protections (Section 3.4.3.2.2, Historic Status of the Gray Whale Population, Protection and Recovery after Commercial Exploitation), the population recovered (Rugh et al. 2005). In 1994, ENP gray whales were delisted under the Endangered Species Act (ESA) (59 Federal Register 31094, Jun. 16, 1994). The current estimated population size is approximately 20,110 animals (Rugh et al. 2008). See Section 3.4, Eastern North Pacific Gray Whale, for more information.

### 1.1.4 Summary of Makah Tribe's Historic Whaling Tradition

The Makah's tradition of whale hunting dates back at least 1,500 years; subsistence use of whale products from drift and stranded whales extends back another 750 years before that time, prior to development of hunting equipment and techniques (Renker 2002). The gray whale was one of the major whale species the Makah hunted due to its predictable near-shore migrations and slow swimming speeds that allowed for approach by canoe (Huelsenbeck 1988; Renker 2002).

Whaling provided a food source for the Tribe; oil, blubber, and other products were also important trade goods for barter with other tribes, as well as for commerce with European traders and settlers. Whaling also provided intangible benefits to the Tribe and was a central organizing feature of Makah culture, as evidenced in the religious and social structure (Sepez 2001). The fact that the Treaty of Neah Bay is the only treaty between the United States government and a Native American tribe that specifically protects the right to hunt whales suggests the historic importance of whaling to the Makah Tribe (*Anderson v. Evans* 2004).

A combination of factors led to the suspension of Makah whaling in the 1920s. Commercial whaling decimated the populations of several whale species and drastically reduced the number of whales available to Makah hunters. Smallpox and other infectious diseases reduced the Tribe's numbers, leading to changes in the Tribe's social structure and suppressing family-owned whaling knowledge (Kirk 1986; Renker 2002). Around the same time, the demand for whale oil plummeted (Henderson 1984), and sealing became more profitable than whaling (Kirk 1986). Throughout this time, the United States government attempted to assimilate Native Americans into western society. The government did not provide the assistance for whaling promised in the

1 treaty negotiations, instead encouraging farming practices that ultimately failed due to the nature  
2 of the environment; it also banned ceremonial activities related to whaling (Renker 2002)  
3 (Section 3.10.3.4.2, Factors Responsible for Discontinuation of the Hunt).

4 The Makah Tribe formally notified NMFS of its interest in re-establishing limited ceremonial and  
5 subsistence whale hunting on May 5, 1995 (Makah Tribal Council 1995a), approximately one  
6 year after NMFS removed the ENP gray whale from the endangered species list. Four years later,  
7 the Makah hunted and landed one gray whale. Judicial decisions have since prevented the Tribe  
8 from hunting gray whales until certain processes are completed. For more information on historic  
9 and contemporary Makah whaling, refer to Section 3.10, Ceremonial and Subsistence Resources  
10 and the September 2007 unlawful take (Section 1.4.2, Summary of Recent Makah Whaling –  
11 1998 through 2007).

## 12 **1.2 Legal Framework**

13 The following section describes the legal framework that will guide NMFS' decisions related to  
14 this project, including environmental review under NEPA, the Treaty of Neah Bay and the federal  
15 trust responsibility, species protection and conservation under the MMPA, and governance of  
16 aboriginal subsistence whaling quotas under the WCA.

### 17 **1.2.1 National Environmental Policy Act**

18 Congress enacted NEPA to create and carry out a national policy designed to encourage harmony  
19 between humankind and the environment. While NEPA neither compels particular results nor  
20 imposes substantive environmental duties upon federal agencies (*Robertson v. Methow Valley*  
21 *Citizens Council* 1989), it does require that they follow certain procedures when making decisions  
22 about any proposed federal actions that may affect the environment. These procedures ensure that  
23 an agency has the best possible information before it to make an informed decision regarding the  
24 environmental effects of any proposed action. They also ensure full disclosure of any associated  
25 environmental risks to the public. Regulations promulgated by the Council on Environmental  
26 Quality (40 CFR [Code of Federal Regulations] 1500-1508) contain specific guidance for  
27 complying with NEPA.

28 Under the Council on Environmental Quality regulations, federal agencies may prepare an  
29 environmental assessment (EA) to determine whether a proposed action may have a significant  
30 impact or effect on the quality of the human environment. Agencies must examine the context of  
31 the action and intensity of the effects to determine the significance of impacts. If information in

1 an EA indicates that the environmental effects are not significant, the agency issues a finding of  
2 no significant impact (FONSI) to conclude the NEPA review. NMFS issued FONSI in two prior  
3 NEPA assessments of Makah whale hunting proposals.

4 NMFS published an EA and FONSI on the first Makah proposal on October 17, 1997 (NMFS  
5 1997), but the Court of Appeals for the Ninth Circuit in *Metcalf v. Daley* (2000) set them aside.  
6 Based primarily on the timing of the agency's environmental review, the court held that NMFS  
7 had failed to take a hard look at the environmental consequences of the action before making an  
8 irreversible commitment to approve the Tribe's proposal. NMFS issued another EA and FONSI  
9 on the second Makah whale hunting proposal on July 12, 2001 (NMFS 2001a). The Court of  
10 Appeals for the Ninth Circuit in *Anderson v. Evans* (2004) ruled that an EIS, rather than an EA,  
11 should have been prepared. The court also stated that the Makah must comply with the process  
12 prescribed in the MMPA for authorizing otherwise-prohibited take of marine mammals in order  
13 to pursue any treaty rights for whale hunting. The *Anderson v. Evans* (2004) ruling requires  
14 NMFS to analyze new issues; informed by that decision, NMFS has prepared this draft EIS. See  
15 Section 1.4.3, Other Environmental Assessments and Court Decisions Informing this Action, for  
16 more details about prior EAs and court rulings related to this action.

17 An EIS provides a detailed statement of the environmental impacts of the action, reasonable  
18 alternatives, and measures to mitigate adverse effects of the proposed actions. Although the  
19 MMPA and NEPA requirements overlap in some respects, the scope of NEPA goes beyond that  
20 of the MMPA by considering the impacts of the proposed federal action on non-marine mammal  
21 resources such as human health and cultural resources.

22 An EIS culminates in a Record of Decision (ROD). The ROD documents the alternative selected  
23 for implementation, may recommend further review, attaches any conditions that the agency may  
24 require, and summarizes the impacts expected to result from the action.

### 25 **1.2.2 Treaty of Neah Bay and the Federal Trust Responsibility**

26 This section provides a brief history of federal-tribal relations, a general legal description of the  
27 treaty rights of the Northwest tribes that evolved from that history, a more specific description of  
28 the Makah treaty right to hunt whales, the recent history of the Makah's efforts to use their treaty  
29 rights, and the current legal framework for implementation of those rights as defined in the Ninth  
30 Circuit Court's decision in *Anderson v. Evans* (2004).

1 Prior to 1871, the United States government often entered into treaties with Indian tribes, which  
2 typically provided for the surrender of large areas of land the Indians occupied to allow for the  
3 westward expansion of non-Indians. In exchange, the United States recognized permanent  
4 homelands (reservations) and sometimes explicitly or implicitly provided for off-reservation  
5 hunting, gathering, and fishing rights. Treaties with Indian tribes are the supreme law of the land  
6 and generally preempt state laws. Treaty language securing fishing and hunting rights is not a  
7 “grant of rights [from the federal government] to the Indians, but a grant of rights from them — a  
8 reservation of those not granted” (*United States v. Winans* 1905). In other words, the tribes retain  
9 rights not specifically surrendered to the United States (commonly referred to as reserved rights).  
10 The scope of reserved Indian hunting, fishing, and gathering rights that have been recognized by  
11 the courts is sometimes very broad and depends on the language of the treaty or the known  
12 culture of the tribe at treaty time. Courts have developed rules for interpreting Indian treaties that  
13 recognize the communication difficulties between the tribes and treaty negotiators, the imbalance  
14 of power between the tribes and the United States, and the fact that the tribes are unlikely to have  
15 understood the legal ramifications of the exact wording of their treaties (Cohen 2005).  
16 Accordingly, courts liberally construe treaties, resolve ambiguities in the tribe’s favor, and  
17 “interpret Indian treaties to give effect to the terms as the Indians themselves would have  
18 understood them” (*Minnesota v. Mille Lacs Band of Chippewa* 1999).

19 Seventeen Indian tribes located in western Washington State have treaty-protected and  
20 adjudicated fishing rights in the Pacific Ocean, Strait of Juan de Fuca, and Puget Sound. The  
21 United States government and the Makah Tribe entered into the Treaty of Neah Bay on  
22 January 31, 1855, and the Senate consented to its ratification on March 8, 1859 (United States  
23 Statutes at Large, Volume 12, Page 939). In addition to reserving the right of taking fish at all  
24 usual and accustomed grounds and stations, Article IV of the treaty secured the rights of whaling  
25 or sealing. The Treaty of Neah Bay is the only treaty between the United States and an Indian  
26 tribe that expressly provides for the right to hunt whales. At the time of the treaty, gray whale  
27 hunting was an integral part of the Tribe’s economy and a foundation of the Tribe’s unique,  
28 maritime-based, indigenous culture.

#### 29 **1.2.2.1 The Stevens Treaties**

30 “To extinguish the last group of conflicting claims to lands lying west of the Cascade mountains  
31 and north of the Columbia River, in what is now the State of Washington, the United States  
32 entered into a series of treaties with Indian Tribes in 1854 and 1855” (*Washington v. Washington*  
33 *State Commercial Passenger Fishing Vessel Association* 1979). These treaties are called the

1 Stevens Treaties after Isaac Stevens, the Governor of Washington Territory, who was the United  
2 States negotiator. The Stevens Treaties settled the land claims and secured the hunting and fishing  
3 rights for numerous tribes, including the Makah Tribe. The promise that the Indian tribes would  
4 be guaranteed continued access to a variety of natural resources essential to their livelihood and  
5 way of life for future generations was essential for securing Indian consent to the treaties with the  
6 United States (*United States v. Washington* 1974). The scope of reserved Indian hunting, fishing,  
7 trapping, and gathering rights that courts have recognized depends on the language of the treaty  
8 and the circumstances surrounding the treaty negotiations (Section 1.2.2, Treaty of Neah Bay and  
9 the Federal Trust Responsibility, for information about how courts interpret treaties).

#### 10 **1.2.2.2 Scope of the Fishing Right under the Stevens Treaties**

11 The fishing clauses of the Stevens Treaties have been at the center of litigation for more than  
12 100 years involving state attempts to limit the exercise of treaty fishing rights. *United States v.*  
13 *Washington* (1974), commonly referred to as the “Boldt” decision, defined the scope of these treaty  
14 rights to fish. The court held that state regulation of treaty fishing was authorized only if reasonable  
15 and necessary for conservation. In affirming this decision the Supreme Court also interpreted the  
16 Stevens Treaties to secure 50 percent of the harvestable surplus of fish passing through their “usual  
17 and accustomed grounds and stations” (*United States v. Washington* 1974) to the tribes, unless their  
18 moderate living needs could be met by a lesser amount (*Washington v. Washington State*  
19 *Commercial Passenger Fishing Vessel Association* 1979). The Treaty of Neah Bay was one of the  
20 Stevens Treaties reviewed in the *United States v. Washington* (1974) litigation. Although the court’s  
21 focus in that proceeding was to address the appropriate exercise of the Tribe’s fishing rights, in  
22 reviewing the treaty, the court noted the following:

23 [t]he treaty commissioners were aware of the commercial nature and value of the  
24 Makah maritime economy and promised the Makah that the government would  
25 assist them in developing their maritime industry. Governor Stevens found the  
26 Makah not much concerned about their land . . . but greatly concerned about their  
27 marine hunting and fishing rights. Much of the official record of the treaty  
28 negotiations deals with this. Stevens found it necessary to reassure the Makah that  
29 the government did not intend to stop them from marine hunting and fishing but in  
30 fact would help them develop these pursuits (*United States v. Washington* 1974).

31 Additionally, the court noted the following:

32 [i]n aboriginal times the Makah enjoyed a high standard of living as a result of  
33 their marine resources and extensive marine trade. . . . The Makah not only  
34 sustained a Northwest Coast culture, but also were wealthy and powerful as  
35 contrasted with most of their neighbors (*United States v. Washington* 1974).

1 The Court of Appeals for the Ninth Circuit similarly noted that the specific reservation of the  
2 right to whale in the Treaty of Neah Bay “suggests the historic importance of whaling to the  
3 Makah Tribe” (*Anderson v. Evans* 2004). The Makah U&A for fishing was defined in a later sub-  
4 proceeding under *United States v. Washington* (1985).

### 5 **1.2.2.3 Limitations on the Exercise of Treaty Rights**

6 Treaty rights are not unbounded. The United States Supreme Court has held that the United States  
7 Congress has full power over Indian lands and Indian tribes and can abrogate federal Indian  
8 treaties (*Lone Wolf v. Hitchcock* 1903) unilaterally, though doing so may implicate  
9 Fifth Amendment taking concerns and the need to pay compensation (*Menominee Indian Tribe v.*  
10 *United States* 1968; *Hynes v. Grimes Packing Company* 1949; *United States v. Shoshone Tribe*  
11 *of Indians* 1938). The courts will not lightly find that treaty rights have been abrogated  
12 (*Menominee Indian Tribe v. United States* 1968). Generally, states cannot regulate treaty hunting  
13 and fishing activities (*Menominee Tribe v. United States* 1968). However, the states of  
14 Washington and Oregon have some ability to limit the exercise of Indian treaty rights for  
15 conservation purposes where such regulation is necessary to sustain the species.

#### 16 **1.2.2.3.1 State Regulation**

17 In the Pacific Northwest, a significant body of law has developed over the last 40 years in  
18 response to state attempts to impose regulations that effectively prevented tribal fishermen from  
19 taking fish at their usual and accustomed places. In the 1970s, the United States brought litigation  
20 on behalf of the Stevens Treaty tribes against the states of Washington and Oregon to establish  
21 the treaty right guarantees of access to the usual and accustomed tribal fishing places and to an  
22 equitable share of the harvestable fish. The courts held that states could not qualify the treaty  
23 right. In a series of decisions responsive to growing concerns regarding the continued viability of  
24 the natural resources in question, however, the Supreme Court affirmed the state’s police power  
25 to regulate tribal fisheries for conservation purposes where such regulation is necessary to sustain  
26 the species. The court stated the following:

27 [t]he right to take fish at all usual and accustomed places may, of course not be  
28 qualified by the State . . . [b]ut the manner of fishing, the size of the take, the  
29 restriction of commercial fishing, and the like may be regulated by the State in  
30 the interest of conservation, provided the regulation meets appropriate standards  
31 and does not discriminate against Indians (*Puyallup Tribe v. Washington*  
32 *Department of Game* 1968).

33 In reviewing state conservation regulations, the courts use the conservation necessity principle to  
34 ensure that the regulation does not discriminate against the treaty tribe’s reserved right to fish, is

1 reasonable and necessary to preserve and maintain the resource, and the conservation required  
2 cannot be achieved by restriction of fishing by non-treaty fishermen or by other less restrictive  
3 means or methods (*United States v. Washington* 1974). As defined in these court decisions,  
4 conservation is a term of art and has been defined alternatively as “those measures which are  
5 reasonable and necessary to the perpetuation of a particular run or species of fish” (*United States*  
6 *v. Washington* 1974) and as “preserving a ‘reasonable margin of safety’ between an existing level  
7 of [salmon] stocks and the imminence of extinction...” (*United States v. Oregon* 1983). Although  
8 the courts have imposed limits on the nature of state regulation of treaty fishing, they have also  
9 held that “neither the treaty Indians nor the state on behalf of its citizens may permit the subject  
10 matter of these treaties to be destroyed” (*United States v. Washington* 1975).

#### 11 **1.2.2.3.2 Federal Regulation**

12 Congress exercises plenary power in the field of Indian affairs. As part of this authority, the  
13 United States Supreme Court has consistently held that Congress, through the enactment of laws,  
14 has the authority to abrogate or modify the exercise of Indian treaty rights. This includes  
15 congressional power to abrogate or modify treaty rights through statutes that address conservation  
16 of natural resources. To find abrogation, however, the Supreme Court has required “clear  
17 evidence that Congress actually considered the conflict between the intended action on the one  
18 hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the  
19 treaty” (*United States v. Dion* 1986). In *Anderson v. Evans* (2004), the court found that the  
20 MMPA applies to the Makah Tribe and constrains its treaty right to harvest whales to ensure that  
21 “the conservation goals of the MMPA are effectuated.” In holding that the MMPA applied to the  
22 Tribe, the court stated that “[w]e need not and do not decide whether the Tribe’s whaling rights  
23 have been abrogated by the MMPA.” The court also noted that “[u]nlike other persons applying  
24 for a permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered”  
25 during review of the Tribe’s request (*Anderson v. Evans* 2004).

#### 26 **1.2.2.4 The Federal Trust Responsibility**

27 The United States and Indian tribes have a unique relationship. From the formation of the United  
28 States to the present, federal law has recognized Indian tribes as independent political entities  
29 with authority over their members and territory (*Worcester v. Georgia* 1832). The United States  
30 Constitution provides Congress with the authority to regulate commerce “among the several  
31 states, and with the Indian Tribes” (United States Constitution, Article I, Section 8, clause 3).  
32 This power to regulate commerce with Indian tribes includes the exclusive authority to enter into  
33 treaties and agreements with Indian tribes regarding their rights to aboriginal lands. Central to

1 such treaties and agreements in the Pacific Northwest is the reservation of Indian hunting,  
2 gathering, and fishing rights both on and off the reservation. These express and implied  
3 reservations preserve the inherent rights of the tribe that have not been limited or abrogated by  
4 treaty or federal legislation. The federal government has a trust responsibility to protect the treaty  
5 hunting, fishing, and gathering rights of Indian tribes.

6 As described by the Supreme Court, “under a humane and self-imposed policy which found  
7 expression in many acts of Congress and numerous decisions of this Court, [the United States]  
8 has charged itself with moral obligations of the highest responsibility and trust” (*Seminole Nation*  
9 *v. United States* 1942).

10 This unique relationship provides the basis for legislation, treaties, and executive orders that grant  
11 unique rights or privileges to Native Americans (*Morton v. Mancari* 1974). The trust  
12 responsibility requires federal agencies to carry out their activities in a manner that is protective  
13 of these express rights (*Gros Ventre Tribe v. United States* 2006). For example, in cases involving  
14 the management of Bureau of Reclamation water projects, the court held that the United States  
15 must exercise its discretion for the benefit of Indian tribes (*Pyramid Lake Paiute Tribe of Indians*  
16 *v. Morton* 1973; *Klamath Water Users Protective Association v. Patterson* 2000; *Klamath*  
17 *Drainage District v. Patterson* 2000). Courts have also ruled that the United States has an  
18 obligation to ensure that tribal oil and gas lessees obtain the best possible return on leases  
19 (*Cheyenne Arapaho Tribes of Oklahoma v. United States* 1992) and to consult with the tribes  
20 before taking administrative action that may affect tribal services (*Winnebago Tribe of Nebraska*  
21 *v. Babbitt* 1996).

22 Executive Order 13175 affirms the trust responsibility of the United States and directs agencies to  
23 consult with Indian tribes and respect tribal sovereignty when taking action affecting such rights.  
24 This policy is also reflected in the March 30, 1995 document, *Department of Commerce-*  
25 *American Indian and Alaska Native Policy* (United States Department of Commerce 1995).  
26 NMFS, as an agent of the federal government, has a trust responsibility to Indian tribes (see, for  
27 example, Secretarial Order 3206).

### 28 **1.2.3 Marine Mammal Protection Act**

#### 29 **1.2.3.1 Section 2 – General Purposes and Policies**

30 Congress enacted the MMPA to protect and conserve marine mammals and their habitats.  
31 Section 2 of the MMPA contains the general purposes and policies of the Act, including  
32 congressional findings (16 USC 1361). Congress was concerned that certain marine mammal

1 species and population stocks were in danger of extinction or depletion, and it intended to  
2 establish protections to encourage development of those stocks to the greatest extent feasible,  
3 commensurate with sound policies of resource management. Therefore, Congress specified that  
4 the primary objective of marine resource management under the MMPA is to maintain the health  
5 and stability of the marine ecosystem. Section 2 indicates that stocks should not be permitted to  
6 diminish beyond the point at which they cease to be a significant functioning element of the  
7 ecosystem, and they should not be permitted to diminish below their optimum sustainable  
8 population (OSP) (Section 3.4.2.1, Marine Mammal Protection Act Management).

### 9 **1.2.3.2 Section 101(a) – Take Moratorium**

10 To achieve the general purposes and policies of Section 2 of the MMPA, Congress established a  
11 moratorium on the taking and importing of marine mammals in Section 101(a) (16 USC 1371(a)).  
12 Under the MMPA, ‘take’ means to “harass, hunt, capture, or kill, or attempt to harass, hunt,  
13 capture, or kill any marine mammal” (16 USC 1362(13)). ‘Harassment’ is defined as follows:

14 . . . any act of pursuit, torment, or annoyance which (1) has the potential to injure a  
15 marine mammal or marine mammal stock in the wild [Level A Harassment]; or (2) has  
16 the potential to disturb a marine mammal or marine mammal stock in the wild by causing  
17 disruption of behavioral patterns, including, but not limited to, migration, breathing,  
18 nursing, breeding, feeding, or sheltering [Level B Harassment] (16 USC 1362(18)(A)).

19 This moratorium is not absolute. Statutory exceptions allow marine mammals to be taken for  
20 scientific or educational purposes and to be taken incidentally in the course of commercial  
21 fishing. A statutory exemption allows take of marine mammals by Alaska Natives for subsistence  
22 purposes or to create and sell authentic native articles of handicraft and clothing. The agency may  
23 also waive the take moratorium under Section 101(a)(3).

### 24 **1.2.3.3 Section 101(a)(3)(A) – Waiver of the Take Moratorium**

25 Section 101(a)(3)(A) authorizes and directs the Secretary of Commerce “from time to time” to  
26 “determine when, to what extent, if at all, and by what means, it is compatible” with the MMPA  
27 “to waive the Section 101(a) take moratorium” (16 USC 1371(a)(3)(A)). NMFS reviews requests  
28 to waive the take moratorium on a case-by-case basis, either when a waiver appears appropriate  
29 or when a specific proposal is under consideration. NMFS waives the moratorium only with  
30 respect to a particular species or stock and then only to the extent provided in the waiver  
31 (Bean 1983). As described in Chapter 3, Section 3.17.3.1, Waivers of the MMPA Take  
32 Moratorium, the waiver process involves a number of steps, is seldom applied for, and NMFS has  
33 not used it many times in its management history.

1 The following discussion responds to public requests made during the scoping period that NMFS  
2 summarize the MMPA procedures for waiving the take moratorium and issuing permits. The  
3 primary steps of the MMPA waiver process include (1) initial waiver determination, (2) formal  
4 rulemaking on the record (including a hearing before a presiding official, such as an  
5 administrative law judge, and proposed regulations), (3) final waiver determination (including  
6 final regulations), and (4) permit process. Preparation of this EIS is the first step in a full  
7 evaluation of the Makah's request to hunt gray whales; it will aid NMFS in future decisions  
8 related to the MMPA (and WCA, discussed in Section 1.2.4, Whaling Convention Act).

#### 9 **1.2.3.3.1 Step 1 – Initial Waiver Determination**

10 NMFS' Northwest Regional Administrator has the delegated authority in this case to make the  
11 initial waiver determination. Section 101(a)(3)(A) of the MMPA contains provisions related to  
12 the waiver determination. Any waiver determination must fulfill the following criteria:

- 13 1. Be based on the best scientific evidence available
- 14 2. Be made in consultation with the Marine Mammal Commission
- 15 3. Have due regard to the distribution, abundance, breeding habits, and times and lines of  
16 migratory movements of the marine mammal stock in question for take
- 17 4. Find that the taking is in accord with sound principles of resource protection and  
18 conservation as provided in the purposes and policies of the MMPA (Section 2)

19 Based on these Section 101(a)(3)(A) criteria, the Regional Administrator will make an initial  
20 determination whether to waive the moratorium. If the agency ultimately decides not to waive the  
21 take moratorium, it would make that decision publicly available in the Federal Register. If the  
22 Regional Administrator makes an initial determination to waive the take moratorium, he would  
23 propose regulations to govern any take under Section 103. Section 103(a) specifies that  
24 regulations must be "necessary and appropriate to [e]nsure that taking will not be to the  
25 disadvantage of [the ENP gray whale stock] and will be consistent with the purposes and policies  
26 [of the MMPA in Section 2]" (16 USC 1373(a)).

27 Section 103(b) requires the agency to consider the effect of such regulations on the following:

- 28 • Existing and future levels of marine mammal species and population stocks
- 29 • Existing international treaty and agreement obligations of the United States
- 30 • The marine ecosystem and related environmental considerations

- The conservation, development, and utilization of fishery resources (not applicable in this case)
- The economic and technological feasibility of implementation

Section 103(c) of the MMPA lists allowable restrictions that regulations may include for takes of marine mammals such as the number, age, size, and sex of animals taken, as well as the season, manner, location, and fishing techniques that may be used (for marine mammals caught in fishing gear incidental to fishing activities). Any regulations would be subject to periodic review and modification to carry out the purposes of the MMPA (16 USC 1373(e)).

#### **1.2.3.3.2 Step 2 – Formal Rulemaking on the Record**

A preliminary determination to waive must be made on the record after opportunity for an agency hearing; this is a formal rulemaking process detailed in agency regulations at 50 CFR Part 228. Under these provisions, the agency would appoint an officer to preside over the hearing (presiding official). The agency would also publish a notice of hearing in the Federal Register regarding the proposed waiver and proposed regulations.

Among other things, the notice would state the place and date for both a pre-hearing conference and the hearing itself; it would detail how and when to submit direct (written) testimony on the proposed waiver and proposed regulations and how and when to submit a notice of intent to participate in the pre-hearing conference and hearing.

In the notice of hearing, NMFS would also specifically publish the following (among other things):

- The proposed waiver and proposed regulations
- The Regional Administrator’s original direct testimony in support of the proposed waiver and proposed regulations (additional direct testimony may be submitted at later times)
- A summary of the statements required by Section 103(d) of the MMPA, including the following:
  - Estimated existing levels of gray whales
  - Expected impact of the proposed regulations on the OSP of the gray whale stock
  - Description of the evidence before the Regional Administrator upon which the proposed regulations would be based
  - Any studies made by or for the Regional Administrator or any recommendations made by or for the agency or the Marine Mammal Commission that relate to the establishment of the proposed regulations

- Issues that may be involved in the hearing
- Any written advice received from the Marine Mammal Commission

The presiding official would examine direct testimony and make a preliminary determination related to the testimonial evidence received. NMFS would make the presiding official's preliminary determination available to the public. After the subsequent pre-hearing conference, the presiding official would decide whether a hearing was necessary. Should the presiding official determine that a hearing was not necessary, the official would publish that conclusion in the Federal Register and solicit written comments on the proposed regulations. After analyzing written comments received, the presiding official would transmit a recommended decision to the NMFS Assistant Administrator.

If, however, the presiding official determined that a hearing was necessary, the official would publish a final agenda for the hearing in the FR within 10 days after the conclusion of the pre-hearing conference. The agenda would list the issues for consideration at the hearing and the parties and witnesses to appear, as well as soliciting direct testimony on issues not included in the notice of hearing. The hearing would then occur at the time and place specified in the notice of hearing, unless the presiding official made changes. The hearing would be a court-like proceeding where witnesses would present direct testimony and be subject to cross-examination from parties (or counsel); oral arguments from the parties (or counsel) might also be given to the presiding official. Interested persons would have another opportunity to comment in writing. After the period for receiving these written briefs expired, the presiding official's recommended decision would be transmitted to NMFS' Assistant Administrator.

#### **1.2.3.3.3 Step 3 – Final Waiver Determination**

Once the NMFS Assistant Administrator received the presiding official's recommended decision, the agency would publish notice of availability in the Federal Register, send copies of the recommended decision to all parties, and provide a 20-day written comment period. At the close of the 20-day written comment period, the NMFS Assistant Administrator would make a final decision on the proposed waiver and proposed regulations. The final decision may affirm, modify, or set aside (in whole or part) the recommended findings, conclusions, and decision of the presiding official. NMFS would publish the decision in the Federal Register, including a statement containing the history of the proceeding, findings, and rationale on the evidence, as well as rulings. If NMFS' Regional Administrator approved the waiver, the agency would promulgate the final adopted regulations with the decision.

#### 1 **1.2.3.3.4 Step 4 — Permit Authorizing Take**

2 Section 104 of the MMPA governs NMFS' issuance of permits authorizing the take of marine  
3 mammals. The agency must publish notice of each application for a permit in the Federal Register  
4 and invite the submission of written data or views from interested parties with respect to the  
5 taking proposed in the application within 30 days after the date of the notice  
6 (16 USC 1374(d)(2)). The applicant for the permit must demonstrate that the taking of any marine  
7 mammal under such permit will be consistent with the purposes and policies of the MMPA and  
8 the applicable regulations established under MMPA Section 103.

9 If an interested party requests a hearing in connection with the permit within 30 days of  
10 publication of the notice, NMFS may afford an opportunity for a hearing within 60 days of the  
11 date of the published notice (16 USC 1374(d)(3)). Any applicant for a permit or any party  
12 opposed to a permit may obtain judicial review of agency's terms and conditions included the  
13 permit, or of the agency's refusal to issue a permit (16 USC 1374(d)(4)). A permit issued under  
14 MMPA Section 104 (16 USC 1374(b)) must be consistent with applicable regulations and must  
15 specify the following:

- 16 • The number and kinds of animals authorized to be taken
- 17 • The location and manner (which NMFS must determine to be humane) in which they  
18 may be taken
- 19 • The period during which the permit is valid
- 20 • Other terms or conditions that NMFS deems appropriate

21 The MMPA defines 'humane' as "that method of taking which involves the least possible degree  
22 of pain and suffering practicable to the mammal involved" (16 USC 1362(4)).

#### 23 **1.2.3.4 Application of the MMPA to Makah Whaling**

24 The Court of Appeals for the Ninth Circuit has twice reviewed Makah proposals to exercise the  
25 treaty right to hunt gray whales. In the most recent decision, the court held that the permit and waiver  
26 provisions of the MMPA must be satisfied before NMFS can authorize the hunt (*Anderson v. Evans*  
27 2004). Relying on the "principles embedded in the Treaty of Neah Bay, itself," the court framed the  
28 issue for decision as "whether restraint on the Tribe's whaling pursuant to treaty rights is necessary  
29 to effectuate the conservation purpose of the MMPA" (*Anderson v. Evans* 2004). The court defined  
30 the conservation purpose of the MMPA as "to ensure that marine mammals continue to be

1 significant functioning element[s] in the ecosystem” and not “diminish below their optimum  
2 sustainable population” (*Anderson v. Evans* 2004).

3 Specifically, the court stated the following:

4 . . . [t]o carry out these conservation objectives, the MMPA implements a sweeping  
5 moratorium in combination with a permitting process to ensure that the taking of  
6 marine mammals is specifically authorized and systematically reviewed. For  
7 example, the MMPA requires that the administering agency consider “distribution,  
8 abundance, breeding habits, and times and lines of migratory movements” when  
9 deciding the appropriateness of waiving requirements under the MMPA, 16 USC.  
10 Section 1371 (a)(3)(A). And, when certain permits are issued, the permit may be  
11 suspended if the taking results in “more than a negligible impact on the species or  
12 stock concerned” (16 USC Section 1371 (a)(5)(B)(ii)). One need only review  
13 Congress’s carefully selected language to realize that Congress’s concern was not  
14 merely with survival of marine mammals, though that is of inestimable importance,  
15 but more importantly with ensuring these that these mammals maintain and remain  
16 significant functioning elements in the ecosystem. The MMPA’s requirements for  
17 taking are specifically designed to promote such objectives. Without subjecting the  
18 tribe’s whaling to review under the MMPA, there is no assurance that the takes by  
19 the tribe of gray whales, including both those killed and those harassed without  
20 success, will not threaten the role of gray whales as functioning elements of the  
21 marine ecosystem, and thus no assurance that the purposes of the MMPA will be  
22 effectuated (*Anderson v. Evans* 2004).

23 Additionally, the court stated the following:

24 . . . [h]ere the purpose of the MMPA is not limited to species preservation. Whether  
25 the Tribe’s whaling will damage the delicate balance of the gray whales in the marine  
26 ecosystem is a question that must be asked long before we reach the desperate point  
27 where we face a reactive scramble for species preservation. (*Anderson v. Evans*  
28 2004).

29 The court found these principles “embedded in the Treaty of Neah Bay” and Supreme Court  
30 precedents and stated the following:

31 . . . [j]ust as treaty fisherman are not permitted to totally frustrate . . . the rights of  
32 non-Indian citizens of Washington to fish . . . the Makah cannot consistent with the  
33 plain terms of the treaty, hunt whales without regard to processes in place and  
34 designed to advance conservation values by preserving in marine mammals or to  
35 engage in whale watching, scientific study, and other non-consumptive uses.  
36 (*Anderson v. Evans* 2004).

37 The court noted that in requiring compliance with the MMPA, “we do not purport to address what  
38 limitations on the scope of a permit, if any is issued, would be appropriate.” Further, in  
39 recognition of the Tribe’s unique status the court stated, “[u]nlike other persons applying for a  
40 permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered in the  
41 NMFS’s review of an application by the Tribe under the MMPA” (*Anderson v. Evans* 2004). The

1 Makah Tribe has informed NMFS that it believes that the Treaty of Neah Bay bars NMFS from  
2 denying the Tribe's MMPA application where tribal whaling can be accomplished in a manner  
3 consistent with the conservation purposes of the MMPA. According to the Tribe, this means that  
4 the whaling would not cause the ENP stock of gray whales to fall below its optimum sustainable  
5 population or to cease to be a significant functioning element of the marine ecosystem  
6 (Makah Tribe 2005a; Makah Tribe 2006a). Furthermore, the Tribe contends that NMFS may not  
7 impose restrictions on the exercise of the Tribe's whaling right, beyond those the Tribe itself  
8 proposed in its MMPA waiver and permit application, unless NMFS shows such restriction to be  
9 necessary to achieve the MMPA's conservation purpose (Makah Tribe 2005a; Makah Tribe  
10 2006a). The Tribe believes that its application is conservative and fully consistent with the  
11 conservation purpose of the MMPA (Makah Tribe 2005a; Makah Tribe 2006a).

#### 12 **1.2.4 Whaling Convention Act**

13 Congress enacted the WCA to implement the domestic obligations of the United States  
14 government under the International Convention for the Regulation of Whaling (ICRW). This EIS  
15 analyzes NMFS' domestic authority and responsibilities under the WCA, but it does not analyze  
16 the position of the United States as a political body in the international arena. The EIS does,  
17 however, describe international whaling governance under the ICRW to provide context for the  
18 WCA statutory and regulatory framework and particularly to address issues raised in public  
19 comments.

#### 20 **1.2.4.1 International Whaling Governance under the ICRW**

21 The ICRW is an international treaty signed on December 2, 1946, to "provide for the proper  
22 conservation of whale stocks and thus make possible the orderly development of the whaling  
23 industry" (ICRW, Dec. 2, 1946, 161 United Nations Treaty Series 72). The United States was an  
24 original signatory to the ICRW in 1946. A focus of the ICRW was the establishment of the IWC.  
25 Functions and operating procedures of the IWC, the IWC's moratorium on commercial whaling,  
26 aboriginal subsistence whaling under the IWC, and the United States' preparation for the IWC,  
27 are described below.

##### 28 **1.2.4.1.1 Functions and Operating Procedures of the IWC**

29 The IWC is an international organization whose membership consists of one commissioner from  
30 each contracting government. Under Article V.1 of the ICRW, the IWC's charge is to adopt  
31 regulations for the conservation and utilization of whale resources by periodically amending the

Schedule, a document that is an integral part of the ICRW. IWC regulations adopted in the Schedule may do the following:

- Designate protected and unprotected species
- Open and close seasons and waters
- Implement limits on the size of whales taken, and on the time, method, and intensity of whaling
- Specify gear, methods of measurement, catch returns and other statistical and biological records, and methods of inspection for the stocks of large cetaceans under IWC jurisdiction (i.e., baleen and sperm whales)

The IWC seeks to reach consensus on Schedule amendments. When consensus is not possible, a three-fourths majority of all who voted may amend the Schedule (each contracting government has one vote).

Article V.2(b) of the ICRW specifies that amendments to the Schedule must be based on scientific findings. The IWC established the Scientific Committee, consisting of approximately 200 of the world's leading whale biologists, to provide advice on the status of whale stocks. The Scientific Committee meets annually in the two weeks immediately preceding the main IWC meeting. It may also call special meetings as needed to address particular subjects during the year.

Article V.3 of the ICRW governs the procedure for amending the Schedule, including application of IWC whaling regulations. In general, amendments to the Schedule are effective 90 days after the IWC notifies each contracting government of the amendment, unless a contracting government objects. If an objection occurs, the objector and other contracting governments have a certain period to present objections to the IWC. After that period expires, the amendment is effective with respect to all contracting governments that have not presented objections, but it is not effective for the objector(s) until the objection is withdrawn. A contracting government may use this procedure when it considers its national interests or sovereignty unduly affected.

#### **1.2.4.1.2 IWC Commercial Whaling Moratorium**

The IWC initially focused on regulation of the commercial whaling industry. In 1982, the IWC approved a moratorium on all commercial whaling in paragraph 10(e) of the Schedule, effectively expanding the 1937 ban on commercial harvest of gray whales and right whales to all large whale species. The commercial whaling moratorium is still in place for all non-objecting parties. Iceland, Norway, and the Russian Federation lodged objections that are currently effective, so the

1 moratorium does not apply to those countries. Paragraph 10(e) also states that the commercial  
2 whaling moratorium “will be kept under review, based upon the best scientific advice,” and that  
3 “the [IWC] will undertake a comprehensive assessment of the effects of [the commercial whaling  
4 moratorium] on whale stocks and consider modification of this provision and the establishment of  
5 other catch limits” (IWC Schedule 2006). The IWC has been developing a revised management  
6 scheme (a management plan for commercial whaling) for the last several years, but has made  
7 little progress on its adoption. There is active debate at the IWC about the sustainability of whale  
8 stocks, the appropriateness of maintaining the ban on all commercial whaling, and the type and  
9 level of supervision of commercial whaling should it resume.

#### 10 **1.2.4.1.3 IWC Aboriginal Subsistence Whaling**

11 The IWC recognizes a distinction between whaling for commercial purposes and whaling by  
12 aborigines for subsistence purposes — aboriginal exceptions were incorporated into predecessor  
13 treaties to the ICRW and have been a part of the whaling regime under the ICRW since the time  
14 of the first Schedule (as used in this EIS, the term ‘aborigines’ refers to indigenous peoples). The  
15 IWC governs aboriginal subsistence whaling by setting catch limits for certain whale stocks in the  
16 Schedule, after considering requests from contracting governments and/or after consulting with  
17 the Scientific Committee. The first gray whale catch limits were set in 1979. When contracting  
18 governments make requests to the IWC to set catch limits in the Schedule, they are acting on  
19 behalf of aborigines in their respective nations, and they submit a proposal to the IWC based on  
20 cultural and nutritional needs documented in a needs statement). At the 1994 annual meeting, the  
21 IWC formally adopted Resolution 1994-4 to reaffirm three broad objectives for evaluating such  
22 requests from contracting governments:

- 23 • To ensure that the risks of extinction to individual stocks are not seriously increased by  
24 subsistence whaling
- 25 • To enable aboriginal people to harvest whales in perpetuity at levels appropriate to their  
26 cultural and nutritional requirements, subject to the other objectives
- 27 • To maintain the status of whale stocks at or above the level giving the highest net  
28 recruitment and to ensure that stocks below that level are moved towards it, so far as the  
29 environment permits

30 The IWC sets catch limits for each whale stock generally in five-year increments and subject to  
31 annual review. These catch limits are contained in paragraph 13 of the Schedule. The WCA  
32 defines aboriginal subsistence whaling as whaling authorized by paragraph 13 of the Schedule  
33 annexed to and constituting a part of the ICRW (50 CFR 230.2). The Schedule does not otherwise

1 define aboriginal subsistence whaling, but delegates adopted the following definition of  
2 subsistence use by consensus at the 2004 annual meeting of the IWC:

- 3 • The personal consumption of whale products for food, fuel, shelter, clothing, tools, or  
4 transportation by participants in the whale harvest.
- 5 • The barter, trade, or sharing of whale products in their harvested form with relatives of  
6 the participants in the harvest, with others in the local community or with persons in  
7 locations other than the local community with whom local residents share familial, social,  
8 cultural, or economic ties. A generalized currency is involved in this barter and trade, but  
9 the predominant portion of the products from each whale are ordinarily directly  
10 consumed or utilized in their harvested form within the local community.
- 11 • The making and selling of handicraft articles from whale products, when the whale is  
12 harvested for the purposes defined in (1) and (2) above.

13 General principles governing aboriginal subsistence whaling are contained in paragraph 13(a) of  
14 the Schedule, and specific catch limits for aboriginal subsistence use are set under paragraph  
15 13(b) of the Schedule. Paragraph 13(a) of the current Schedule includes the 13(a)(4) prohibition  
16 on the “strick[ing], tak[ing] or kill[ing] calves or any whale accompanied by a calf,” and the  
17 13(a)(5) requirement that “all aboriginal whaling shall be conducted under national legislation  
18 that accords with paragraph 13 of the Schedule” (IWC Schedule 2006). Paragraph 13(a)(5) is a  
19 recent modification to the Schedule, adopted by consensus during the 2004 IWC plenary session.  
20 The language was moved from the more specific provisions in 13(b) to the more general  
21 provisions in 13(a). The modification is consistent with Article V.2(c) of the ICRW, which  
22 specifies that the IWC may not set catch limits for any particular nationality (e.g., specified native  
23 peoples) or group of whalers (i.e., individual whaling operations). Native peoples engaging in  
24 subsistence hunts do so under permit issued by their governments. In the United States, the WCA  
25 provides the mechanism for implementing the catch limits set in the IWC Schedule.

26 Paragraph 13(b) of the current schedule (IWC Schedule 2007) sets the following catch limits for  
27 2008 through 2012:

- 28 • Aborigines taking bowhead whales from the Bering-Chukchi-Beaufort Seas stock  
29 (paragraph 13(b)(1))
- 30 • Aborigines, or a Contracting Government acting on behalf of aborigines, taking gray  
31 whales from the Eastern stock in the North Pacific (paragraph 13(b)(2))

- 1 • Aborigines taking minke whales from the West Greenland and Central stocks, fin whales
- 2 from the West Greenland stock, and bowhead whales from the West Greenland feeding
- 3 aggregation<sup>1</sup> (paragraph 13(b)(3))
- 4 • The Bequians of St. Vincent and the Grenadines taking humpback whales (Explanatory
- 5 Notes to the Schedule indicate that the ‘Bequians’ are specifically named in paragraph
- 6 13(b)(4) for geographical purposes alone, so as not to be in contravention of
- 7 Article V.2(c) of the ICRW, which prohibits naming of particular groups of whalers)

8 Paragraph 13(b)(2) sets a catch limit of 620 ENP gray whales, limited to 140 whales per year  
 9 (reviewable annually by the IWC and its Scientific Committee), to “aborigines or a Contracting  
 10 Government on behalf of aborigines . . . only when the meat and products of such whales are to  
 11 be used exclusively for local consumption and distribution.” The IWC set this catch limit for the  
 12 ENP gray whale stock after receiving and considering a joint request from the United States and  
 13 the Russian Federation to revise such a catch limit in the Schedule. By a bilateral agreement  
 14 between the United States and the Russian Federation, the ENP gray whale catch limit is  
 15 allocated as 20 whales (up to five per year) for the Makah, and 600 whales (up to 135 per year)  
 16 for the Chukotka Natives. The IWC does not have a formal definition of aboriginal use of whale  
 17 products for ‘local consumption and distribution.’ NMFS interprets the IWC’s 2004 ‘subsistence  
 18 use’ definition and the current Schedule regarding local distribution as proposed by the Makah to  
 19 mean that the Makah could share whale products from any hunt within the borders of the United  
 20 States with the following:

- 21 • Relatives of participants in the harvest
- 22 • Others in the local community (both non-relatives and relatives)
- 23 • Persons in locations other than the local community with whom local residents share
- 24 familial, social, cultural, or economic ties

#### 25 **1.2.4.1.4 United States’ IWC Interagency Consultation**

26 The United States, as a contracting government to the ICRW, recognizes the IWC as the global  
 27 organization with the authority to manage whaling. The United States negotiating positions at the  
 28 IWC are advanced by the United States Commissioner to the IWC; the United States  
 29 Commissioner is appointed by the President and serves at his pleasure. The United States  
 30 Commissioner is not a federal agency. Negotiating positions advocated by the United States

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<sup>1</sup> The annual quota from this feeding aggregation shall only become operative when the Commission has received advice from the Scientific Committee that the strikes are unlikely to endanger the stock. (paragraph 13 (b)(3) (iv).

1 Commissioner on behalf of the United States are not final agency actions; these positions may  
2 change during the negotiations. The United States' negotiating positions advocated before the  
3 IWC, moreover, may or may not be adopted by the IWC, and any attempt to analyze effects on  
4 the human environment would be speculative.

5 The United States nevertheless conducts both an internal and public review of whaling issues  
6 before making any requests to revise catch limits in the Schedule. When the United States  
7 receives a request (needs statement) from a Native American tribe to whale for subsistence  
8 purposes, NOAA's Office of International Affairs, the United States Commissioner to the IWC,  
9 and the Department of State first review the needs statement. The United States Commissioner  
10 may also consult with other federal agencies as appropriate. Before each annual IWC meeting, the  
11 United States Commissioner presents the draft United States position on whaling issues,  
12 including proposals to revise aboriginal subsistence whaling catch limits, to the public at the IWC  
13 Interagency Committee meeting. These interagency meetings take place at least once a year in the  
14 Washington D.C. area, and they are open to any United States citizen with an interest in whaling,  
15 except for individuals representing foreign interests. Representatives of environmental and animal  
16 rights groups, Native American groups, sustainable use groups, and other concerned citizens  
17 typically attend. When relevant, Makah whaling issues have been discussed at public IWC  
18 Interagency meetings since May of 1995. In each case, attendees have reviewed and commented  
19 on the draft United States position at the IWC related to requesting revisions of catch limits in the  
20 Schedule.

#### 21 **1.2.4.2 National Whaling Governance under the WCA**

##### 22 **1.2.4.2.1 United States' Acceptance or Rejection of IWC Regulations**

23 Congress enacted the WCA to implement the domestic obligations of the United States under the  
24 ICRW. Under Section 916b of the WCA, the Secretary of State (with concurrence by the  
25 Secretary of Commerce) has the vested power to present or withdraw objections to regulations of  
26 the IWC on behalf of the United States as a contracting government. See Section 1.2.4.1.1,  
27 Functions and Operating Procedures of the IWC, for more information.

##### 28 **1.2.4.2.2 National Prohibition of Commercial Whaling**

29 The United States was a party to the 1937 Agreement that banned commercial whaling of gray  
30 whales. The United States was also instrumental in urging the IWC to adopt the 1982 moratorium  
31 on commercial whaling of all species (commercial whaling of all species in the United States has

1 been prohibited nationally since 1971). The United States remains opposed to commercial  
2 whaling.

### 3 **1.2.4.2.3 National Aboriginal Subsistence Whaling**

4 The Secretary of Commerce holds general powers, currently delegated to NMFS, to administer  
5 and enforce whaling in the United States, including adoption of necessary regulations to carry out  
6 that authority. The regulations prohibit whaling, except for aboriginal subsistence whaling, which  
7 is defined as “whaling authorized by paragraph 13 of the [IWC] Schedule” (50 CFR 230.2).  
8 NMFS publishes aboriginal subsistence whaling quotas set in accordance with paragraph 13 of  
9 the Schedule in the Federal Register, together with any relevant restrictions, and incorporates  
10 them into cooperative management agreements with tribes (50 CFR 230.6(a)).

11 NMFS may not necessarily publish a quota, even where an IWC catch limit is set for a particular  
12 stock. In 2000 and 2001, for instance, NMFS did not publish available quotas for ENP gray  
13 whales for the Makah during portions of the 1998 through 2002  
14 five-year period due to litigation (nor has NMFS issued a quota for the 2008 quota period). To  
15 authorize the proposed Makah whale hunting, NMFS would have to publish an aboriginal  
16 subsistence whaling quota in the Federal Register annually for the Makah’s use. NMFS would  
17 also have to enter into a cooperative management agreement with the Makah Tribe. Publication  
18 of any of the quota for 2008 through 2012, as well as consideration of any cooperative  
19 management agreement with the Tribe, is contingent upon completion of this NEPA review and  
20 the MMPA formal rulemaking procedures described above. Any published quotas are allocated to  
21 each whaling village or tribal whaling captain by the appropriate Native American whaling  
22 organization (entities recognized by NMFS as representing and governing the relevant Native  
23 American whalers for the purposes of cooperative management of aboriginal subsistence  
24 whaling).

25 WCA regulations track the IWC provisions that prohibit whaling of any calf or whale  
26 accompanied by a calf (50 CFR 230.4(c)). They also prohibit any person from selling or offering  
27 for sale whale products from whales taken in aboriginal subsistence hunts, except that authentic  
28 articles of native handicrafts may be sold or offered for sale (50 CFR 230.4(f)). Regulations also  
29 require that whaling not be conducted in a wasteful manner (50 CFR 230.4(k)), which means a  
30 method of whaling that is not likely to result in the landing or a struck whale or that does not  
31 include all reasonable efforts to retrieve the whale (50 CFR 230.2).

1 The WCA and its implementing regulations require licensing and reporting. No one may engage  
2 in aboriginal subsistence whaling except a whaling captain or a crewmember under the whaling  
3 captain's control. Whaling captains are identified by the relevant Native American whaling  
4 organization, which must provide evidence or an affidavit that the whale catcher (i.e., vessel) is  
5 adequately supplied and equipped and has an adequate crew (WCA Section 916d(d)(1) and  
6 50 CFR 230.4(d)). The license may be suspended if the whale captain fails to comply with  
7 WCA regulations (50 CFR 230.5(b)). If any tribe salvages a stinker (a dead, unclaimed whale  
8 found upon a beach, stranded in shallow water, or floating at sea, 50 CFR 230.2), it must provide  
9 NMFS with an oral or written report describing the circumstances of the salvage within 12 hours  
10 of the event (50 CFR 230.7). No person may receive money for participation in aboriginal  
11 subsistence whaling (WCA Section 916d(d) as implemented through 50 CFR 230.4(e)). The  
12 whaling captain and Native American whaling organization are also responsible for reporting the  
13 number, dates, and locations of strikes, attempted strikes, or landings of whales, including certain  
14 data from landed whales, to NMFS (50 CFR 230.8).

#### 15 **1.2.4.3 Application of the WCA to Makah Whaling**

16 The United States seeks IWC approval of an appropriate catch limit before authorizing any  
17 authorization of aboriginal subsistence whaling under the WCA (NMFS 2001a).

18 The Makah Tribe believes that the United States' obligation to the Makah Tribe takes precedence  
19 over United States obligations under the ICRW (Makah Tribe 2005a). Although the Makah Tribe  
20 does not believe that the Makah subsistence harvest requires IWC approval, the Tribe has worked  
21 cooperatively with the United States government to obtain that approval. At the IWC's annual  
22 meeting held in May 2007, the IWC approved by consensus an aboriginal subsistence whaling  
23 catch limit of 620 gray whales for the 2008 through 2012 five-year period, limited to a maximum  
24 of 140 takes (i.e., lethal takes) per year. The catch limit was based on the joint request of the  
25 United States and the Russian Federation. A bilateral agreement between the United States and  
26 the Russian Federation allocates the catch limit for the stock as follows: 20 whales over the five-  
27 year period, with a maximum of five whales per year, on behalf of the Makah, and 600 whales  
28 over the five-year period, with a maximum of 135 whales per year, on behalf of the Chukotka  
29 Natives. The United States currently holds the aboriginal subsistence whaling quota for the ENP  
30 gray whale stock on behalf of the Makah, but NMFS has not published it in the Federal Register  
31 due to the pending regulatory processes described in this EIS.

### **1.3 Purpose and Need for Action**

#### **1.3.1 Purpose for Action**

The purpose for this action is for NMFS to respond to the Makah's request to hunt ENP gray whales for ceremonial and subsistence purposes. If NMFS authorizes the Makah to hunt gray whales, the combined regulatory actions (i.e., MMPA waiver of the take moratorium, promulgation of regulations, and issuance of any necessary permits, plus WCA publication of a quota and execution of a cooperative management agreement) would authorize the Makah to kill up to an approved number of gray whales that would not exceed any annual or five-year IWC catch limits. The Makah Tribe's purpose is to resume its traditional hunting of gray whales under its treaty right. Chapter 2, Alternatives, contains additional details of the proposed action.

#### **1.3.2 Need for Action**

The need for this action is for NMFS to address federal trust responsibilities to the Makah, particularly with respect to the Tribe's reserved whaling rights under the Treaty of Neah Bay, and to comply with the requirements of the MMPA and the WCA. Under the MMPA, NMFS must protect and conserve the gray whale population; under the WCA, the agency must regulate whaling in accordance with the ICRW and IWC regulations. The Makah's need for the action is to exercise its treaty whaling rights to provide a traditional subsistence resource to the community and to sustain and revitalize the ceremonial, cultural, and social aspects of its whaling traditions.

#### **1.3.3 Decisions to be Made**

NMFS is conducting this environmental review under NEPA as a first step in the full evaluation of the Makah's proposal to hunt gray whales. This EIS evaluates the effects of the proposed action and five alternative actions (including the No-action alternative) on the human (including social and biological) environment, as well as suitable mitigation measures. By examining the impacts of the proposed action and a full range of alternatives, the EIS will provide information key to making decisions relevant to the Tribe's proposed action, such as the following:

- Degree of conservation impacts to the gray whale population and the local marine ecosystem
- Degree of impacts to the Makah Tribe
- Degree of other impacts to the local environment, such as public safety, aesthetics, public sentiment regarding whales, and tourism/whale-watching

## **1.4 Background and Context**

### **1.4.1 Summary of Aboriginal Subsistence Whaling Catch Limits**

#### **1.4.1.1 Worldwide Catch Limits**

Before 1976, the IWC provided a blanket exemption for aboriginal subsistence whaling. Since 1976 (and 1979 for gray whales), the relevant provisions of the IWC Schedule addressing aboriginal subsistence whaling are in paragraph 13. Paragraph 13(a)(5), in particular, provides that “all aboriginal whaling shall be conducted under national legislation that accords with this paragraph.” The IWC has regulated aboriginal subsistence whaling through catch limits set under paragraph 13(b) of the Schedule. These limits include the following stocks:

- Bering-Beaufort-Chukchi Seas stock of bowhead whales (the stock of interest to Alaska Natives and Chukotka Natives under management control of the United States and the Russian Federation, respectively)
- ENP gray whale stock (the stock of interest to the Makah Tribe and Chukotka Natives under management control of the United States and the Russian Federation, respectively)
- West Greenland and Central Stocks of minke whales, West Greenland stock of fin whales and a West Greenland bowhead feeding aggregation (stocks of interest to the Greenlanders under control of Denmark)
- North Atlantic humpback whales (stocks of interest to the Bequians, under control of St. Vincent and the Grenadines)

Canada’s First Nation members have also harvested bowhead whales, but they are not currently operating under IWC catch limits set in the Schedule, because Canada is not a party to the ICRW. Maa-Nulth First Nations on Vancouver Island made an agreement with the Canadian government in December 2006 to forgo their traditional right to hunt gray whales for at least 25 years, in exchange for land, a share of mineral and timber resources on that land, and a cash settlement (CBC News 2006; Indian and Northern Affairs 2006).

Chapter 3.17.3.2.3, Aboriginal Subsistence Whaling, provides more detail about aboriginal subsistence whaling, including the contracting governments’ reported number of whales harvested.

#### **1.4.1.2 United States Catch Limits**

The United States has requested that the IWC revise catch limits in the Schedule on behalf of two native groups: the Alaska Eskimos and the Makah Tribe. The Eskimos and the Makah are the only two native groups in the United States that have asked the government to request revisions to

1 catch limits in the Schedule from the IWC on their behalf. The Eskimos, as Alaska Natives, are  
2 exempt from the MMPA take moratorium under Section 101(b), and the Makah hold the only  
3 treaty right referring expressly to whaling.

#### 4 **1.4.1.2.1 Relevant Overview of Requests for Bowhead Whales on Behalf of Alaska Eskimos**

5 Relevant information about United States' requests for bowhead whale catch limits on behalf of  
6 the Alaska Eskimos is presented here, because the history gives context to the current IWC  
7 process described above in Section 1.2.4.1.3, IWC Aboriginal Subsistence Whaling. Like Makah  
8 hunting of gray whales, Eskimos have hunted bowhead whales as an important species for  
9 subsistence and for social and cultural purposes for at least 2,000 years (Stoker and Krupnik  
10 1993). Hunting bowhead whales in Alaska remains a communal activity that supplies meat and  
11 'maktak' (whale skin and layer of blubber that is used for food) for the entire community, as well  
12 as for feasts and during annual celebrations. Formalized patterns of hunting, sharing, and  
13 consumption characterize the modern bowhead hunt. The bowhead hunt is the principal activity  
14 through which younger generations learn traditional skills for survival in the Arctic. It also  
15 provides ongoing reinforcement of the traditional social structure. In addition to being a major  
16 source of food, the bowhead subsistence hunt is a large part of the cultural tradition of these  
17 communities and helps define their modern cultural identity (Braund et al. 1997).

18 Since 1976, the United States, on behalf of the Alaska Eskimos, has requested that the IWC  
19 revise the bowhead catch limits in the Schedule, and the IWC has set catch limits for the bowhead  
20 whale stock in the Schedule after considering the nutritional and cultural need for bowhead  
21 whales by Alaska Eskimos and the level of harvest that is sustainable. The United States and the  
22 Russian Federation share a quota based on the IWC catch limits for the Western Arctic bowhead  
23 stock, approved at the annual meeting of the IWC in June of 2007 for the 2008 through 2012 five-  
24 year period. The catch limit is allocated between the United States and the Russian Federation  
25 through a bilateral agreement.

26 Due to some controversy and negotiations about appropriate catch limits for Alaska Eskimo  
27 bowhead hunts in 1977 and 1978, a meeting of experts on wildlife science, nutrition, and cultural  
28 anthropology convened in Seattle from February 5 to 9, 1979 (the experts in cultural  
29 anthropology convened for this meeting were known as the Cultural Anthropology Panel). Their  
30 charge was to examine the Alaska Eskimo bowhead harvest, provide data, and develop them for  
31 an IWC Technical Committee examining the aboriginal subsistence whaling processes. The  
32 Cultural Anthropology Panel at that meeting developed a working definition of subsistence use

(IWC 1979a), a term not defined in the ICRW or the Schedule. Delegates to the 2004 annual meeting of the IWC subsequently adopted the working definition of subsistence use by consensus (Section 1.2.4.1.3, IWC Aboriginal Subsistence Whaling). A subsequent working group convened in 1981 (the *Ad Hoc* Technical Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous [Aboriginal] Peoples) agreed to the following working definition of aboriginal subsistence whaling and related concepts (IWC 1982):

- *Aboriginal subsistence whaling* means whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous, or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and the use of whales.
- *Local aboriginal consumption* means that traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence and cultural requirements. The term includes trade in items which are by-products of subsistence catches.
- *Subsistence catches* are catches of whales by aboriginal subsistence whaling operations.

While the IWC has not formally adopted the 1981 Ad Hoc Technical Working Group's definition of aboriginal subsistence whaling, it did adopt a definition of subsistence use in 2004 (Section 1.2.4.1.3, IWC Aboriginal Subsistence Whaling). The same 1981 Ad Hoc Technical Working Group also developed three broad objectives for the IWC to use when evaluating aboriginal subsistence whaling proposals from contracting governments. The IWC did formally adopt these three principles in Resolution 1999-4, detailed above in Section 1.2.4.1.3, IWC Aboriginal Subsistence Whaling.

#### **1.4.1.2.2 Overview of Requests for ENP Gray Whales on Behalf of the Makah**

On May 5, 1995, approximately a year after the ENP gray whale was removed from the endangered species list, the Makah Tribal Council formally notified NMFS of its interest in reestablishing ceremonial and subsistence hunts for gray whales (Makah Tribal Council 1995a). The Tribe anticipated harvesting only one or two whales initially, but included five as the maximum extent of the yearly harvest, if it determined that it could use additional whales effectively and allocate them to each of five ancestral villages (Makah Tribal Council 1995a). The Makah agreed not to sell whale meat commercially, developed a comprehensive needs statement, and entered into a cooperative management agreement with NMFS to manage the whale hunt. At the 1995 annual meeting of the IWC, the United States did not request that the

1 IWC revise the Schedule to set a catch limit for the ENP gray whale stock, but informed the IWC  
2 that it intended to submit a formal proposal on the Makah's behalf in the future (IWC 1996).

3 At the annual meeting of the IWC in 1996, the United States acted on the Makah's behalf and  
4 made a request that the IWC revise the Schedule to set a catch limit for the ENP gray whale  
5 stock, requesting up to five ENP gray whales per year from 1997 through 2000. At both the  
6 Aboriginal Subsistence Whaling Subcommittee and IWC plenary meetings, many delegates  
7 supported the United States' request. Other delegates indicated they would vote against the  
8 proposal. One reason given for this opposition was that the United States did not ask the Russian  
9 Federation to share the existing 1995 to 1997 catch limit of 140 ENP gray whales per year, which  
10 was based on the cultural and nutritional needs of the Chukotka Natives (IWC 1997;  
11 63 FR 16701, April 6, 1998). Instead, the United States adhered to a prior position that each  
12 contracting government requesting a revision to the Schedule for aboriginal subsistence whaling  
13 catch limits must submit its own proposal before the IWC (IWC 1997; 63 FR 16701, April 6,  
14 1998). Opponents noted that granting the United States request would increase the total ENP gray  
15 whale catch limit beyond what had already been set by the IWC in paragraph 13(b)(2) of the  
16 Schedule (IWC 1997). At the 1996 meeting, the Russian Federation had also requested a catch  
17 limit of five bowhead whales a year, but withdrew its request when a consensus could not be  
18 reached among delegates. The bowhead stock catch limit was already set for the United States  
19 and was not shared with Russia (IWC 1997).

20 Another reason for the opposition was that some delegates questioned whether the Makah had a  
21 "continuing traditional dependence" on whaling (IWC 1997), a component of the working  
22 definition for aboriginal subsistence whaling developed by the 1981 Ad Hoc Technical Working  
23 Group (Section 1.4.1.2.1, Relevant Overview of Requests for Bowhead Whales on Behalf of  
24 Alaska Eskimos). The delegates noted that the Makah had not hunted gray whales since the 1920s  
25 (IWC 1997). United States delegates and Makah representatives responded that the Makah Tribe  
26 had continued aspects of its whaling tradition through names, dance, songs, and other cultural  
27 traditions (IWC 1997; United States 1996). The United States also noted that nutritional need is a  
28 factor in considering and setting aboriginal subsistence whaling catch limits, but not a threshold  
29 requirement. United States delegates used the example of the IWC setting a catch limit for the  
30 bowhead stock for many years after considering the United States' requests on behalf of the  
31 Alaska Eskimos, even though the Nutrition Panel at the 1979 workshop for aboriginal subsistence  
32 whaling of bowhead concluded that nutritional needs of Eskimos could be met through local  
33 subsistence or western-type foods (IWC 1979b; United States 1996). Moreover, the Makah needs

1 statement (Renker 1996) had demonstrated a continued subsistence reliance on traditional marine  
2 foods available to the Makah, and a nutritional need based on poverty and economic conditions  
3 on the Makah Reservation (Renker 1996; United States 1996). The United States noted that  
4 federal agents in the last five decades had actively prevented Makahs from consuming and  
5 utilizing whales that drifted onto Makah beaches, by burying or burning the drift whales and by  
6 threatening Makah members who tried to access the products with jail and other federal sanctions  
7 (United States 1996). As late as the 1970s, federal agents were still entering Makah households  
8 and searching freezers for the presence of marine mammal products (United States 1996).  
9 Attendees of the 1996 meeting were also aware of other conflict regarding the Makah's proposal  
10 to hunt; the United States House of Representatives Committee on Resources had unanimously  
11 passed a resolution expressing opposition to the Makah hunt (United States Congress 1996), and  
12 some members of the Makah Tribe testified against the United States proposal at the IWC  
13 meeting. The United States made a statement in appreciation of the support from some delegates,  
14 noted the reservations expressed by others, and after, consultation with the Makah Tribe,  
15 announced that it was withdrawing its request for an amendment to the Schedule for the gray  
16 whale catch limit. The United States asked the IWC to defer consideration until the next year,  
17 when the ENP gray whale catch limit was due to expire, and the needs of the Chukchi people  
18 were also determined (IWC 1997).

19 In preparation for the annual meeting of the IWC in 1997, the United States considered comments  
20 made at the 1996 meeting that the gray whale catch limit should be shared with the Russian  
21 Federation, making the combined requests 140 rather than 145 gray whales per year  
22 (63 FR 16701, April 6, 1998). The gray whale catch limit set in the Schedule for the Russian  
23 Federation (acting on behalf of the Chukotka Natives) was due to expire in 1997, so the Russian  
24 Federation would have to request a new Schedule amendment for a five-year catch limit from  
25 1998 through 2002 (63 FR 16701, April 6, 1998). After extensive discussions with the Alaska  
26 Eskimo Whaling Commission and the Makah Tribe, as well as an internal policy review, the  
27 United States delegation consulted with the Russian Federation delegation on the appropriate  
28 formulation for a request (63 FR 16701, April 6, 1998). The Makah made efforts to augment their  
29 needs statement and request, including conducting research and training on the proposed method  
30 of hunting whales (such as conducting field tests of rifles with Dr. Ingling, a veterinarian with  
31 IWC experience). They also gathered more information about the nutritional value of subsistence  
32 foods in their diet.

1 At the Aboriginal Subsistence Whaling Subcommittee meeting on October 18, 1997, the United  
2 States raised several points in support of the proposal: 1) law (the Treaty of Neah Bay specifically  
3 reserves the right of the Makah to hunt whales), 2) culture (the Makah have a  
4 1,500-year tradition of whaling that has been of central importance to their culture), 3) science  
5 and conservation (there would be no adverse conservation impacts to the stock), and 4) Makah  
6 progress on improving the needs statement and request since the last IWC meeting (United States  
7 1997; IWC 1998). Related to this last point, Dr. Ingling presented results of field trials on the  
8 weapon, ammunition, and techniques to be used in the Makah hunt (Ingling 1997; IWC 1998).  
9 A representative of the Makah Tribal Council also spoke, emphasizing the central focus and  
10 importance of whaling to Makah culture (IWC 1998). Opponents again raised concerns about the  
11 interruption in the Makah whaling practice. Some delegates thought that the Makah did not  
12 demonstrate nutritional and/or cultural need, based on the 1981 *Ad Hoc* Technical Working  
13 Group definitions of aboriginal subsistence whaling and consumption, while others stated that  
14 discontinuity of whaling practice should not be held against the Makah because they were  
15 deprived of cultural and traditional rights (IWC 1998). Some delegates thought the Makah had  
16 established cultural need beyond a doubt (IWC 1998).

17 At the 1997 IWC plenary session, the United States and the Russian Federation presented joint  
18 requests for bowhead and ENP gray whale catch limits to accommodate the needs of two  
19 aboriginal groups hunting from a single stock (Alaska Eskimos and s hunting bowheads and the  
20 Makah Tribe and Chukotka Natives hunting ENP gray whales). This was the first year in which  
21 two contracting governments simultaneously requested revisions to the Schedule for catch limits  
22 from the same stock. For the bowhead stock, delegates considered the joint request and adopted  
23 the catch limit of 280 bowhead whales for the 1998 through 2002 five-year period, with a  
24 maximum limit of 67 per year, by consensus on the afternoon of October 22, 1997 (IWC 1998).  
25 The bowhead catch limit was allocated between the Russian Federation and the United States by  
26 a bilateral agreement.

27 For the ENP gray whale stock, the joint request of 620 gray whales for the 1998 through 2002  
28 five-year period, with a maximum limit of 140 gray whales per year, was debated in IWC plenary  
29 session on the afternoon of October 22, 1997 (63 FR 16701, April 6, 1998). Some delegates  
30 suggested making an amendment to the introductory portion of the proposal. The debate session  
31 then adjourned to allow for consultation among the delegates (63 FR 16701, April 6, 1998).  
32 Specifically, two delegates proposed that the following words be added to paragraph 13(b)(2) of  
33 the Schedule, “whose traditional subsistence and cultural needs have been recognized by the

1 International Whaling Commission” (IWC 1998). United States delegates responded that the  
2 words “by the International Whaling Commission” were not acceptable, because the IWC had no  
3 established mechanism for recognizing such needs, other than adoption of a catch limit in the  
4 Schedule (63 FR 16701, April 6, 1998). The United States delegates expressed their  
5 understanding that adoption of a catch limit in the Schedule constituted IWC approval, with no  
6 further action required. A clear majority of Commissioners then expressed their support for the  
7 United States approach (63 FR 16701, April 6, 1998). When the plenary session resumed, the  
8 Chair announced consensus. The joint request of the United States and the Russian Federation for  
9 a gray whale catch limit was adopted on October 23, 1997, with the addition of the words “whose  
10 traditional aboriginal subsistence and cultural needs have been recognized” to the Schedule  
11 language (63 FR 16701, April 6, 1998; IWC 1998). The ENP gray whale catch limit was  
12 allocated between the Russian Federation and the United States by a bilateral agreement (120  
13 gray whales per year for the Chukotka Natives, and an average of four gray whales per year, with  
14 a maximum of five, for the Makah).

15 At the annual meeting of the IWC in 2002, the IWC adopted a catch limit of 620 ENP gray  
16 whales for the 2003 through 2007 five-year period by consensus. The catch was limited to 140  
17 takes per year, based on a second joint request of the United States and the Russian Federation  
18 (IWC Schedule 2002), which was similar to the first successful joint request in 1997. The United  
19 States and Russian Federation then allocated the ENP gray whale catch limit by bilateral  
20 agreement, to a maximum of 20 whales over the five-year period and up to five whales annually  
21 for the Makah, and a maximum of 600 gray whales over the five-year period and up to 135 per  
22 year for the Chukotka Natives.

23 At the annual meeting of the IWC in 2003, the Russian Federation noted anomalies in the  
24 Schedule about the way that Chukotka Natives are treated compared with other aboriginal groups  
25 operating under aboriginal subsistence whaling auspices (IWC 2004a; IWC 2004b). They  
26 proposed changes to the Schedule, including changes to paragraph 13(b)(2). Paragraph 13(b)(2)  
27 read as follows:

28 [t]he taking of gray whales from the Eastern stock in the North Pacific is  
29 permitted, but only by aborigines or a Contracting Government on behalf of  
30 aborigines, and then only when the meat and products of such whales are to be  
31 used exclusively for local consumption by the aborigines whose traditional  
32 aboriginal subsistence and cultural needs have been recognized. . . .

33 The Russian Federation proposed to delete the words “whose traditional aboriginal subsistence  
34 and cultural needs have been recognized” (IWC 2004a; IWC 2004b). The Russian Federation’s

1 stated objective was to achieve consistency in the Schedule and to, therefore, eliminate  
2 discriminatory behavior against the native peoples of Chukotka, because they interpret such  
3 language restrictions as preventing the important practice of cultural exchange of goods among  
4 indigenous peoples (IWC 2004a; IWC 2004b). The IWC subsequently charged a small group,  
5 comprising the Russian Federation, Denmark, Australia, the United States, and the IWC  
6 Secretariat, to review paragraph 13 of the Schedule to determine how to achieve consistency  
7 across aboriginal subsistence whaling operations (IWC 2004a).

8 The small group submitted a report to the Aboriginal Subsistence Whaling Subcommittee at the  
9 annual meeting of the IWC in 2004 (IWC 2005a; IWC 2005b), together with proposed changes to  
10 the Schedule. The report had two key recommendations: 1) move the prohibition on take of  
11 calves and mother/calf pairs to the general principles governing all hunts in paragraph 13(a),  
12 2) delete the language, “the aborigines whose traditional aboriginal subsistence and cultural needs  
13 have been recognized” from paragraph 13(b)(2) of the Schedule (IWC 2005a; IWC 2005b). The  
14 latter recommendation was related to the Russian Federation’s interpretation that the quoted  
15 provision violated the human rights of Chukotka Natives, because the restriction was not included  
16 in other subparagraphs governing aboriginal subsistence whale hunts and, therefore, improperly  
17 discriminated against the Chukotka Natives (IWC 2005a; IWC 2005b). The Russian Federation  
18 maintained that the Chukotka Natives have equal rights to other aboriginal communities to use  
19 whale products (IWC 2005a; IWC 2005b).

20 At the 2004 IWC plenary session, delegates adopted the report of the small group and the  
21 proposed Schedule amendments by consensus, with one revision. They retained a calf and  
22 mother/calf take prohibition specific to St. Vincent and the Grenadines. Since 2004, the Schedule  
23 has read as follows for the ENP gray whale stock catch limit:

24 [T]he taking of gray whales from the Eastern stock in the North Pacific is permitted,  
25 but only by aborigines or a Contracting Government on behalf of aborigines, and then  
26 only when the meat and products of such whales are to be used exclusively for local  
27 consumption by the aborigines (IWC Schedule 2005 and 2006 paragraph 13(b)(2)).

28 The IWC also adopted the 1979 Cultural Anthropology Panel’s definition of subsistence use in  
29 2004. See Section 1.2.4.1.3, IWC Aboriginal Subsistence Whaling, for more details about the text  
30 of the current Schedule, as well as for the text of the formally adopted definition on subsistence  
31 use.

32 On February 14, 2005, the Makah initiated the current proposal to hunt ENP gray whales and  
33 submitted a request for a waiver of the MMPA take moratorium to NMFS; NMFS had not

1 published the 2003 through 2007 quota under the WCA due to the 2004 decision in *Anderson v.*  
2 *Evans*. In October 2005, the House of Representatives Committee on Resources passed a non-  
3 binding resolution (House of Representatives Congressional Resolution 267) by a vote of 21 to 6,  
4 expressing disapproval of the MMPA waiver process and stating that the United States should  
5 uphold the treaty rights of the Makah Tribe. The Committee's report (House Report 109-283) was  
6 placed on the House of Representatives' calendar without further action. NMFS is currently  
7 reviewing the Makah's proposal to hunt, as described in this chapter. At the May 2007 IWC  
8 meeting the United States and the Russian Federation again made a joint request for an ENP gray  
9 whale catch limit from the IWC for the 2008 through 2012 five-year period under similar terms as  
10 the last catch limit for 2003 through 2007. The catch limit was approved by consensus.

#### 11 **1.4.2 Summary of Recent Makah Whaling — 1998 through 2007**

12 In 1998, NMFS published a yearly quota of up to five gray whales for the Makah in the Federal  
13 Register (63 FR 16701, April 6, 1998), operating under the 1998 to 2002 five-year quota.  
14 Although the Makah Tribal Council issued several whaling permits and tribal whalers conducted  
15 a number of practice exercises, they did not actually hunt whales that year. Protest activities and  
16 conflicts near and on the shores of Neah Bay during 1998 are described in Public Safety, Section  
17 3.15.3.4, Behavior of People Associated with the Hunt. Protest vessels mobilized on  
18 November 11, 1998, but in response to a false report that the Tribe was hunting and had harvested  
19 a whale (United States Coast Guard [Coast Guard] 1998).

20 During the spring northward migration in 1999, NMFS again published a yearly quota of up to  
21 five gray whales for the Makah in the Federal Register (64 FR 28413, May 26, 1999). The Makah  
22 Tribal Council issued a 10-day whaling permit to the Makah whaling captain on May 10, 1999,  
23 based on the recommendation of the Makah Whaling Commission acting in accordance with the  
24 1998 Gray Whale Management Plan. Whale hunting spanned four nonconsecutive days,  
25 May 10, 11, 15, and 17, and all hunts were conducted in the coastal portion of the Makah's U&A,  
26 south of Cape Flattery (i.e., outside the Strait of Juan de Fuca) to target whales migrating  
27 northward. Two vessels and crews were directly involved in the whale hunting activities,  
28 including the Makah whaling crew in their canoe, *The Hummingbird*, and a rifleman, backup  
29 harpooner, and diver on board the tribal chase boat. NMFS and Makah tribal fisheries observers  
30 were on board the NOAA observer boat *Research II*. In addition, media helicopters, one or two  
31 chartered media vessels, protest vessels, Coast Guard law enforcement, and shore-based

1 supporters and opponents were present most of the time. A tribal commercial fishing boat, acting  
2 as a support vessel, was also nearby and available to assist the whalers.

3 On May 10, 1999, the first day of whale hunting, the Makah crew searched for gray whales near  
4 Father and Son Rock, Cape Alava, Spike Rock, Umatilla Reef, and Point of the Arches  
5 (Gosho 1999; United States Coast Guard 1999a). At least four whales were sighted throughout  
6 the day, with three of the four sightings occurring in 115 to 134 feet of water (Gosho 1999). The  
7 observers did not see calf-sized whales in the area (NMFS 1999). The Makah whaling crew threw  
8 one harpoon at a whale, but missed it (Gosho 1999; NMFS 1999; NMFS and Makah Tribal  
9 Council 2000). The hunt was disrupted by vessel-based protesters who maneuvered between the  
10 two Makah vessels and the whales. Protesters tried to scare off the whales, and they also fired  
11 flares and smoke flares at the Makah whaling party vessels (NMFS 1999; Sunde et al. 1999;  
12 United States Coast Guard 1999a). Because most of the hunting occurred south of the Coast  
13 Guard's regulated navigation area (RNA), a 500-yard moving exclusionary zone (MEZ) around  
14 the Makah vessels was not in effect (NMFS 1999). Coast Guard officials detained two of the  
15 protesters, who they subsequently cited for grossly negligent operation of a vessel, and the  
16 Clallam County sheriff then arrested the protesters for reckless endangerment (NMFS 1999;  
17 Sunde et al. 1999; United States Coast Guard 1999a). At least three media helicopters were  
18 present (United States Coast Guard 1999a). Hunting on May 11 (day two) continued in the same  
19 area, but the Makah whaling captain called it off in a few hours due to poor weather conditions  
20 (Gosho 1999; NMFS 1999). No whales were sighted or approached.

21 Whale hunting resumed on May 15, 1999, day three, near Father and Son Rock, Ozette Island,  
22 and the Bodeltehs (Gosho 1999), south of the RNA (NMFS 1999). Several gray whales were  
23 sighted in 87- to 95-foot-deep water, but the Makah crew was unable to maneuver  
24 *The Hummingbird* close enough to throw harpoons and was again interrupted by protest vessels  
25 (Gosho 1999). Around 11:00 a.m., the whalers sighted a whale and threw a harpoon, which was  
26 assumed to contact the whale because the wooden harpoon holder was split, and the float  
27 disappeared underwater for a short time (Gosho 1999; NMFS 1999). The strike did not appear to  
28 penetrate or embed in the animal because the harpoon head was intact and clean, the throw was  
29 parallel to the animal (rather than perpendicular), and the float resurfaced (Gosho 1999;  
30 NMFS 1999). Because the harpoon did not embed in the whale and did not appear to cause  
31 serious injury, it did not meet the definition of a strike under the 1998 Gray Whale Management  
32 Plan. (Gosho 1999; NMFS 1999) Under that plan, a strike counted only if the harpoon embedded  
33 in the whale and if it might have resulted in death or serious injury. About an hour later, the

1 Makah harpooner threw another harpoon and missed (Gosho 1999). Protest vessels were active  
2 around the whalers much of the day. Two protest vessels came into contact with whales; one  
3 vessel ran over the top of a whale and temporarily stunned it, while another vessel hit the flukes  
4 of a diving whale beside the Makah canoe (NMFS 1999). The Coast Guard cited four vessels for  
5 grossly negligent operations and/or MMPA take infractions, and three of the vessels were taken  
6 into federal custody (NMFS 1999).

7 On May 17, 1999 (the fourth and final day of whale hunting), the Makah crew continued hunting  
8 southwest of Father and Son Rock, south of the RNA. No protest vessels attempted to disrupt the  
9 hunt, but three media helicopters covered events throughout the day (United States Coast Guard  
10 1999b). At 6:55 a.m., the Makah crew sighted a whale and pursued it in the canoe; the whale  
11 surfaced on the right side of the canoe, and crew harpooned it as it moved across the bow of the  
12 canoe (Gosho 1999; NMFS 1999). The harpoon remained affixed to the whale, which pulled the  
13 harpoon line and floats underwater and towed the canoe (Gosho 1999; NMFS 1999). The whaling  
14 crew in the canoe held the harpoon line while the chase boat approached the whale for the Makah  
15 rifleman to kill the animal with a .577 caliber rifle. The gunner fired the first and second shots at  
16 6:58 a.m.; both shots missed (Gosho 1999). At 7:01 a.m., a third shot was fired, striking the  
17 whale behind the blowhole and slightly to the left, momentarily stunning the whale (Gosho 1999).  
18 A second harpoon was also thrown at the whale, striking it on the right side towards the rear  
19 (Gosho 1999). The fourth and final shot was fired at 7:03 a.m., striking the whale behind the  
20 blowhole slightly to the right, and leaving the whale motionless at the surface (Gosho 1999).  
21 Immediately after the final shot, a third harpoon was thrown, striking the whale on the right side  
22 (Gosho 1999). The total time to death, from the initial harpoon strike to the last shot that  
23 dispatched the whale, was 8 minutes. The body of the whale sunk and was supported by the lines  
24 on the three attached harpoons (Gosho 1999). A Makah diver attached a heavier line around the  
25 tail stock of the whale for towing (Gosho 1999), and the whale was towed by a Makah support  
26 vessel to inside the breakwater at Neah Bay, where tribal members had gathered on the beach to  
27 celebrate the hunt. The whale was transferred from the support vessel to four canoes from various  
28 Washington Indian tribes, led by the crew of the Makah *Hummingbird* canoe, and towed from the  
29 deeper part of the breakwater into the shallow water at the edge of the beach (J. Sepez, pers.  
30 comm. 2007). The whale was then pulled onto the beach by approximately three dozen male  
31 tribal members, tugging in unison on hand-held ropes (J. Sepez, pers. comm. 2007).

32 The whale was butchered following tribal ceremonies. Tribal members removed almost all edible  
33 portions of the meat and blubber from the whale by midnight. NMFS biologists collected samples

1 from internal organs after tribal members removed the meat and took it home or to the  
2 community freezer (Gosho 1999; NMFS 1999). Tribal members flensed small portions of meat  
3 the next day to prepare the skeleton for a museum display (NMFS 1999; NMFS and Makah  
4 Tribal Council 2000). Tribal members consumed the meat and blubber during tribal ceremonies  
5 (Gosho 1999; NMFS and Makah Tribal Council 2000; NMFS 1999). According to measurements  
6 NMFS and tribal observers took, the harvested whale was a non-lactating female that measured  
7 30 feet, 5 inches (9.27 meters) long. Fluke width was 7 feet, 4 inches (2.2 m). The whale could  
8 not be weighed, but, based on gray whales taken by the Russian harvest of similar length and  
9 body condition, it was estimated to weigh approximately 5 to 7 metric tons. Age could not be  
10 determined either, but, based on similar lengths of whales taken in the Russian harvest, it was  
11 probably more than two years old. An examination of the skull during butchering revealed that  
12 the third shot struck the ridge of the skull, shattering it, and proceeded back into the muscle near  
13 the left flipper, where whalers found the bullet (the bullet was intact with no deformation). The  
14 fourth shot struck the skull above the occipital condyle and entered the braincase; it likely caused  
15 instantaneous loss of consciousness and death (Gosho 1999).

16 During the fall/winter southward migration in 1999/2000, the Makah Tribal Council did not issue  
17 any whaling permits because weather conditions were unsuitable. Hunting began during the  
18 spring northward migration for seven days between April 17, 2000, and May 29, 2000  
19 (Gearin and Gosho 2000). The Makah tribal whalers actively hunted gray whales in the coastal  
20 portion of the Makah U&A south of Cape Flattery for seven days, during which no whales were  
21 harvested, struck, or struck and lost (Gearin and Gosho 2000). Except for a few approaches near  
22 Makah Bay, most hunting occurred south of Point of Arches near Father and Son Rock. Makah  
23 whalers threw harpoons on three occasions, but the harpoons did not attach to a gray whale on  
24 any of these attempts. The first two throws appeared to be complete misses (Gearin and Gosho  
25 2000). The third throw may have grazed the whale; however, the harpoon did not implant or  
26 detach (Gearin and Gosho 2000). Most of the whales in the area during the hunt were large single  
27 individuals. The whales appeared to be actively migrating, because the average time between  
28 surface sightings (i.e., the average dive time) was about eight minutes, which is four or five  
29 minutes longer than the average dive time for whales feeding or resting locally, and the whales  
30 were farther offshore (i.e., 80 to 100 feet rather than 30 to 60 feet deep) (Gearin and Gosho 2000).

31 All hunts occurred within the Coast Guard's RNA and MEZ (Gearin and Gosho 2000). During  
32 the first two days of hunting (April 17 and 20), protesters disrupted the hunts (Gearin and  
33 Gosho 2000). On April 20, Coast Guard personnel boarded two protest vessels and issued

1 warnings (United States Coast Guard 2000). One of the vessels entered the 500-yard MEZ on  
2 three occasions subsequent to the Coast Guard advisory; the Coast Guard again intercepted and  
3 warned it (United States Coast Guard 2000). On at least one of these three entrances into the  
4 MEZ, the vessel entered the 500-yard MEZ at high speed and was intercepted within 50 yards of  
5 the Makah's canoe (Gearin and Gosho 2000). Two individuals on jet skis also entered the MEZ,  
6 making high speed charges at the Makah canoe (United States Coast Guard 2000). The Coast  
7 Guard intercepted both jet skiers. One jet skier ran into a Coast Guard vessel and sustained  
8 shoulder injuries; Coast Guard personnel retrieved the individual from the water, placed her under  
9 arrest, and transported her to Olympic Memorial Hospital (United States Coast Guard 2000). The  
10 Coast Guard also intercepted and arrested the second jet skier, and transferred him to the Clallam  
11 County sheriff's office (United States Coast Guard 2000). After a temporary delay, hunting  
12 resumed for five nonconsecutive days in May (May 6, 7, 10, 12, and 29). One to three protester  
13 vessels were present during these times, but they did not enter the MEZ to disrupt whale hunting  
14 (Gearin and Gosho 2000). Media helicopters were present during most of the whale hunting and  
15 appeared to comply with the Sanctuary's 2,000-foot minimum allowable flight altitude.

16 Makah whalers had intended to continue whaling into June, but the Makah Tribal Council did not  
17 issue any permits after the June 9, 2000 ruling by the Court of Appeals for the Ninth Circuit in  
18 *Metcalf v. Daley* (2000). The Makah Tribal Council did not issue any whaling permits during the  
19 gray whale southward migration in fall/winter 2000. The whale harvested in 1999 is the only  
20 whale that the Makah have harvested in contemporary times. Some Makah members have,  
21 however, participated in whale hunt research, education, and training with other indigenous  
22 groups. In August of 2005, for instance, two Makah members and a tribal whale biologist traveled  
23 to the eastern shores of the Russian Federation. The biologist was involved in an IWC scientific  
24 exchange to evaluate the type of data that Chukotka Natives collected in their hunts and to  
25 evaluate the logistics of studying the 'stinky whale phenomenon' (whales that have a strong  
26 chemical smell and are inedible). The Makah members participated in a cultural exchange to  
27 observe the Chukotka gray whale hunts and to receive training in whale hunting techniques and  
28 whale butchering.

29 On September 8, 2007, five members of the Makah Indian Tribe hunted and killed a gray whale  
30 in the Strait of Juan de Fuca in a hunt that was not authorized by the Tribe or NMFS. This  
31 unauthorized hunt did not comply with numerous provisions and restrictions defined in the  
32 Tribe's application, and both the Tribe and NMFS made statements condemning the unlawful  
33 hunt (Hogarth 2007; Rosenberg 2007).

1 The five tribal members used two boats and had in their possession a .577 caliber rifle and a  
2 Weatherby .460 caliber rifle (*U.S.A. v. Gonzales et al.* 2007). One of the boats and all of the rifles  
3 belonged to the Tribe and were obtained by one of the members of the hunting party (*U.S.A. v.*  
4 *Gonzales et al.* 2007). Sometime on the morning of September 8, the hunters approached a gray  
5 whale approximately 40 feet long near Seal Rock and harpooned it with at least five harpoons  
6 (Mapes 2007). They then shot the whale at least 16 times (*U.S.A. v. Gonzales et al.* 2007).  
7 According to a report by the Tribe, none of the members of the hunting party had received tribally  
8 sanctioned training in use of the weapons to kill gray whales (Scordino 2007a). A tribal biologist  
9 who evaluated the whale's condition in the afternoon of September 8 counted four visible  
10 harpoons and 16 bullet holes (Scordino 2007b). The whale died shortly after 7:00 p.m. on  
11 September 8 (Scordino 2007b).

12 On October 5, 2007 the five tribal members were indicted in federal court for unauthorized  
13 whaling, unauthorized take of a marine mammal, and conspiracy to engage in unlawful whaling  
14 (*U.S.A. v. Gonzales et al.* 2007). On November 16, 2007, the five were charged in tribal court for  
15 violating the Tribe's gray whale management plan, violating state and federal laws, and reckless  
16 endangerment (Casey 2007; *Makah Tribe v. Andrew Noel* 2007). On March 27, 2008, three of the  
17 tribal members entered guilty pleas to unlawful taking a marine mammal in violation of the  
18 MMPA (*U.S.A. v. Gonzales* 2008; *U.S.A. v. Parker* 2008; *U.S.A. v. Secor* 2008). Their sentencing  
19 is currently scheduled for June 30, 2008. On April 7, 2008, after a Bench Trial on Stipulated  
20 Facts, the court found the remaining two tribal members guilty of conspiracy and unlawful taking  
21 of a marine mammal in violation of the MMPA (*U.S.A. v. Noel and Johnson* 2008). Their  
22 sentencing is also scheduled for June 30, 2008. The criminal charges filed in the Makah Tribal  
23 Court are pending.

#### 24 **1.4.3 Other Environmental Assessments and Court Decisions Informing this Action**

25 In 1996, NMFS entered into a cooperative agreement with the Makah Tribe to ensure a United  
26 States request before the IWC to amend the Schedule's catch limit for the ENP gray whale stock  
27 and jointly manage the gray whale hunts. Before NMFS could publish any quota for the Makah  
28 Tribe, it had to amend the WCA regulations, which only provided for aboriginal subsistence  
29 whaling by the Alaska Eskimo Whaling Commission. NMFS conducted a NEPA analysis on its  
30 proposed rule to amend the regulations and on March 26, 1996, issued a finding that the proposed  
31 regulations would not have a significant impact on the environment.

1 In 1996, the United States' request on behalf of the Makah Tribe to the IWC to revise the  
2 Schedule's catch limit for ENP gray whales met with resistance, and the United States withdrew  
3 the request. In response to concerns raised by some conservation organizations, in June 1997,  
4 NMFS initiated a NEPA process to analyze the environmental impacts of a decision to publish an  
5 aboriginal subsistence whaling quota under the WCA for the Makah's use of up to five ENP gray  
6 whales annually. The draft EA was released for comment in August 1997. A few months later,  
7 NMFS entered into a second cooperative management agreement with the Makah Tribe. It was  
8 similar to the first, except that the second agreement included time and area restrictions aimed at  
9 reducing the likelihood of taking a gray whale from the local area (Pacific Coast Feeding  
10 Aggregation survey area). NMFS and the Makah entered into the agreement on October 13, 1997,  
11 and NMFS issued the final EA and a FONSI four days later.

12 Conservation groups challenged NMFS' FONSI in court, and the Ninth Circuit set aside the EA  
13 and FONSI in *Metcalf v. Daley* (2000), because NMFS did not produce them until after entering  
14 into the cooperative agreement with the Tribe. With the court's invalidation of the EA and  
15 FONSI, NMFS terminated the second cooperative agreement with the Makah Tribe and began a  
16 second NEPA process. On July 12, 2001, NMFS issued a second EA and FONSI regarding a  
17 similar Makah whaling proposal. Conservation groups challenged that EA and FONSI in court,  
18 and the Ninth Circuit ruled that the agency should have prepared an EIS rather than an EA in  
19 *Anderson v. Evans* (2004).

20 On March 6, 2003, NMFS initiated an EIS to assess the environmental impacts of publishing the  
21 2003 to 2007 quota for the Makah's use under the WCA (68 FR 10703). Due to pending  
22 litigation, NMFS did not complete the EIS. In initiating the present process to prepare an EIS,  
23 NMFS gave notice it was terminating the previous EIS initiated in 2003 (70 FR 4991,  
24 August 25, 2005). The present EIS assesses the environmental impacts of publishing the 2008 to  
25 2012 quota for the Makah's use under the WCA.

## 26 **1.5 Scoping and the Relevant Issues**

### 27 **1.5.1 Scoping Process**

28 Scoping is an open process agencies must conduct under NEPA to determine the range and  
29 significance of the issues to be analyzed in depth in an EIS (40 CFR 1501.7). As part of the  
30 scoping process, agencies invite the participation of affected federal, state, and local agencies,  
31 Indian tribes, the proponent of the action, and other interested persons, all of whom help to  
32 identify relevant issues to address in the EIS, while helping the agency eliminate insignificant

1 issues from detailed study. Scoping can also help determine the level of analysis and types of data  
2 needed. The scoping process for this EIS involved a number of activities that included both  
3 internal and public scoping. These activities are described in the following paragraphs.

#### 4 **1.5.1.1 Internal Scoping**

5 NMFS received the Makah Tribe's request for a limited waiver of the MMPA take moratorium  
6 on February 14, 2005, and initiated internal scoping shortly thereafter, in the spring of 2005.  
7 During internal scoping, NMFS identified a preliminary list of resources to address in the EIS,  
8 along with five preliminary alternatives (including the No-action alternative) to serve as starting  
9 points for discussion. NMFS conducted this effort to help the public provide meaningful  
10 comments on resource issues and alternatives to the proposed action during the public scoping  
11 period. NMFS reevaluated the preliminary resources and alternatives following receipt and  
12 review of public comment.

#### 13 **1.5.1.2 Public Scoping**

##### 14 **1.5.1.2.1 Public Comment Periods and Meetings**

15 NMFS initiated public scoping on August 25, 2005, by publishing a Notice of Intent (NOI) to  
16 conduct public scoping meetings and prepare an EIS in the FR (70 FR 49911). The NOI  
17 announced a 60-day comment period (August 25 to October 24, 2005) to gather public input on  
18 the scope of the EIS, resources to analyze, and alternatives to consider. The NOI also included the  
19 dates, times, and locations of three public scoping meetings in Washington State, provided  
20 background information related to the proposed action, and included the list of resources and  
21 preliminary alternatives identified during internal scoping. NMFS noted that the scope of the  
22 NEPA review was limited specifically to the MMPA formal rulemaking process (i.e., waiving the  
23 take moratorium and issuing regulations and any necessary permits). NMFS published a second  
24 NOI with the same background information on October 4, 2005 (70 FR 57860), to set a fourth  
25 scoping meeting in Silver Spring, Maryland, in response to public requests for an additional  
26 public meeting in the Washington D. C. area.

27 In addition to the two NOIs, NMFS notified the public that scoping began by issuing a press  
28 release to local media on August 25, 2005, and placing three public notices in key northwest  
29 Washington newspapers, including the *Peninsula Daily News* (September 19, 2005), *Seattle Post-*  
30 *Intelligencer* (September 21, 2005), and *Seattle Times* (September 21, 2005). The agency also  
31 mailed an informational letter to interested parties (from a mailing list of 824 federal, state,  
32 county and local agencies, elected officials, Native American organizations, nongovernmental

organizations, businesses, media outlets, libraries, and individuals) to provide information about the dates, times, and locations of the public scoping meetings, as well as details about the meeting format. The two NOIs, the NOAA Fisheries press release, and the informational letter were posted on the NMFS Northwest Region website (<http://www.nwr.noaa.gov>) before the meetings and were provided at the public meetings. NMFS also wrote additional information and provided other background material to the public through its website and at the public meetings. These information sheets consisted of the following: ‘*Gray Whale Fact Sheet*,’ ‘*Chronology of Major Events Related to the Makah Tribal Whale Hunt*,’ and ‘*Overview of the Makah Indian Tribe’s Waiver Request*.’ Preaddressed comment forms and compact discs containing the Makah’s waiver request were available at the meetings, and the public had an opportunity to share materials with one another. All scoping meetings were in October 2005 (Table 1-2).

**TABLE 1-2. SCHEDULE AND LOCATION OF PUBLIC SCOPING MEETINGS**

DATE	TIME	PLACE	CITY
October 5, 2005	6:30 to 9:30 p.m.	Makah Tribal Council Community Hall	Neah Bay, WA
October 6, 2005	6:30 to 9:30 p.m.	Vern Burton Memorial Community Center	Port Angeles, WA
October 11, 2005	6:30 to 10:00 p.m.	South Lake Union Park	Seattle, WA
October 18, 2005	10:00 a.m. to 1:00 p.m.	NOAA Auditorium	Silver Spring, MD

The public scoping meetings followed a workshop format to provide an opportunity for interaction between NMFS staff and the public in small group discussions. Each meeting began with an introduction by a facilitator, followed by two PowerPoint presentations given by NMFS employees (one presentation on the NEPA review process related to the Makah’s request for a waiver of the MMPA take moratorium and one presentation on gray whale biology and population status). NMFS staff and contractors then facilitated small group discussions where the meeting attendees were invited to comment on the proposed action, focusing on resources to analyze and alternatives to consider in the EIS. Although comments from the small group discussions were captured in writing, they were not recorded verbatim. Facilitators reconvened all meeting attendees at the end of each session to present some of the major themes from the small group discussions. Attendees were encouraged to provide more detailed statements through written comments by using mail, email, fax, or comment forms.

NMFS reviewed both verbal and written comments received during public scoping and drafted a scoping report to document the scoping process and summarize public comments. Several comments related to the IWC and WCA aboriginal subsistence whaling processes

(e.g., precedential effects and subsistence). In response to these comments, the agency reconsidered the previous decision to conduct NEPA review only on the MMPA formal rulemaking process. NMFS ultimately decided that because it was considering the authorization of the Makah proposed whale hunting under both the WCA and the MMPA, a single EIS should be conducted to review these related actions. A third NOI was published in the Federal Register on February 27, 2006 (71 FR 9781), notifying the public of NMFS' decision to expand the scope of the EIS to include WCA publication of a quota and reopening another 30-day comment period (February 27 through March 29, 2006). Another letter to interested parties notified them of the second comment period (NMFS updated the mailing list to 1,066 entries following the public meetings). Both the NOI and the letter were posted on the NMFS Northwest Region's website (<http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-Whale-Hunt.cfm>).

#### **1.5.1.2.2 Other Public Scoping**

On September 15, 2005, 24 letters went to Indian tribes and organizations in the Northwest informing them of NMFS' intent to prepare an EIS and inviting them to participate in the process. No requests were received for formal participation.

Five letters were also sent to federal agencies on September 14, 2005, inviting them to participate in the NEPA process as cooperating agencies, including NOAA's National Marine Sanctuaries Program, Olympic Coast National Marine Sanctuary staff, the United States Fish and Wildlife Service (FWS), the Coast Guard, the Environmental Protection Agency (EPA), and the Bureau of Indian Affairs. Of those invited, the Bureau of Indian Affairs accepted NMFS' invitation to be a formal cooperating agency in a letter dated October 27, 2005. The Bureau of Indian Affairs has participated in the preparation of this EIS.

### **1.5.2 Concerns Identified During Scoping**

The following concerns were identified during both internal and public scoping. Detailed discussions of many of these concerns occur throughout this document.

#### **1.5.2.1 Water Quality**

- Potential effects to marine ecosystem from worst-case scenario vessel fuel/contaminant spill or protesting equipment
- Potential effects to quality of local drinking water from exposure to whale products
- Potential effects to marine ecosystem from exposure to whale products

#### 1.5.2.2 Marine Habitat and Species

- Potential effects on marine habitat (such as kelp beds, surfgrass, intertidal area, or other habitat features)
- Potential effects of removing whales from the ecosystem

#### 1.5.2.3 ENP Gray Whales

- Potential effects on the ENP gray whale population of removing individual whales in the project area by hunting
- Potential effects on gray whale presence in the local area (Pacific Coast Feeding Aggregation survey area) as a result of removing individual whales from the project area or from disturbing or frightening the whales in connection with hunting activities
- Potential effect on individual gray whales from specific hunting methods

#### 1.5.2.4 Other Wildlife Species

- Potential effects on wildlife of noise
- Potential effects on wildlife of visual disturbance
- Potential effects on wildlife from fuel/contaminant spills
- Potential direct effects on wildlife from unintentionally striking animals with vessels or weapons
- Potential indirect effects on marine wildlife resulting from changes in prey availability due to the removal or redistribution of gray whales

#### 1.5.2.5 Economics

- Potential economic effects on land-based, tourism-related businesses
- Short-term effects of tourism increase or decrease related to whale hunts
- Long-term effects of whale hunting on county-wide tourism
- Potential economic effects on water-dependent businesses
- Effects on the local (Strait of Juan de Fuca), Pacific Northwest, and Pacific coast whale-watching industry
- Effects on the international shipping and local commercial and recreational fisheries

#### 1.5.2.6 Environmental Justice

- Potential disproportionate socioeconomic (employment and income) effects on minority and low-income populations
- Potential disproportionate sociological effects on minority and low-income populations

#### 1.5.2.7 Social Environment

- Potential effects on attitudes and emotions, including spiritual beliefs

- 1 • Potential effects on human relations

#### 2 **1.5.2.8 Cultural Resources**

- 3 • Potential impacts to archaeological and historical sites or traditional cultural properties in
- 4 the project area

#### 5 **1.5.2.9 Ceremonial and Subsistence Resources**

- 6 • Potential impacts to Makah culture from resuming whaling
- 7 • Potential impacts to Makah culture from not being allowed to resume whaling

#### 8 **1.5.2.10 Noise**

- 9 • Disturbance to human visitors in the immediate vicinity of hunting activities
- 10 • Disturbance to onshore communities or homes on the Makah Reservation

#### 11 **1.5.2.11 Aesthetics**

- 12 • Visual effects on on-scene observers of the hunt
- 13 • Visual effects on off-site observers of the hunt through the media

#### 14 **1.5.2.12 Transportation**

- 15 • Potential for the hunt and related activities to interfere with normal marine vessel traffic
- 16 • Potential for the hunt and related activities to interfere with normal aircraft traffic
- 17 • Potential for the hunt and related activities to interfere with normal highway traffic
- 18 • Potential for hunt and related traffic to cause accidents or disrupt essential emergency
- 19 services transit

#### 20 **1.5.2.13 Public Services**

- 21 • Potential for hunt-related activities to result in injuries or other emergency incidents that
- 22 exceed the capacities of tribal and other local public health facilities
- 23 • Potential for hunt-related activities to affect and potentially overwhelm tribal, county, and
- 24 Coast Guard law enforcement personnel and facilities
- 25 • Potential for hunt-related activities to detract from enforcement needed in other areas

#### 26 **1.5.2.14 Public Safety**

- 27 • Potential effects on public and hunter safety related to possible methods of dispatching
- 28 whales
- 29 • Potential effects on public and hunter safety from wounded whales
- 30 • Potential effects on public and hunter safety of prevailing weather and sea conditions
- 31 • Potential effects on public and hunter safety related to protest activities and conflicts

1    **1.5.2.15 Human Health**

- 2       • Potential positive health effects on tribal members and others consuming any whale  
3       products
- 4       • Potential negative effects from ingesting potential contaminants contained in freshly  
5       harvested and drift whale products

6    **1.5.2.16 Concerns not Specifically Related to a Resource Area**

- 7       • Precedential effect on the MMPA if take moratorium is waived (would other tribes or  
8       organizations be able to obtain waivers more easily)
- 9       • Precedential effect on whaling world-wide if a hunt is authorized
- 10      • Effect on the Makah and other tribes associated with upholding or denying treaty rights
- 11      • International effect of denying an ethnic minority a subsistence right secured in a treaty

12   **1.6 Relationship to Other Treaties, Laws, Regulations, Policies, and Processes**

13   Various authorities — both international and national (federal, state, and local) treaties, laws,  
14   regulations, policies, and processes — may apply to the whale hunting activities proposed by the  
15   Makah Tribe. While some of these authorities require specific agency action before any hunt,  
16   such as promulgation of regulations and issuance of permits, others require agency review and  
17   consultation. Table 1-3 lists those authorities that are most relevant to the Makah Tribe's  
18   proposed whale hunting.

**TABLE 1-3. INTERNATIONAL, NATIONAL, STATE, AND TRIBAL TREATIES, LAWS, REGULATIONS, POLICIES, AND PROCESSES THAT MAY BE REQUIRED FOR MAKAH WHALING**

AUTHORITY	OVERSIGHT BODY	DESCRIPTION OF AUTHORITY, NECESSARY ACTION, OR REVIEW/CONSULTATION
IWC Schedule, Paragraph 13 (Aboriginal Subsistence Whaling Catch Limits)	IWC and United States government	Sets catch limits by whale stock based on requests from contracting governments acting on behalf of aborigines (and informed by scientific advice). United States has submitted requests, and the IWC has set catch limits, on behalf of the Makah.
Treaty of Neah Bay	United States government and NMFS	Establishes fishing, whaling, and sealing rights for the Makah. United States and NMFS must decide how best to meet their federal trust responsibilities.
MMPA	NMFS	Prohibits the take of marine mammals, subject to a waiver of the moratorium and/or compliance with a statutory exemption. Consistent with the 9 <sup>th</sup> Circuit decision in <i>Anderson v. Evans</i> (2004) and in response to the Makah tribe's request to whale, NMFS must initially decide whether to waive the moratorium on take for the Makah's proposed whale hunting, proceed through formal rulemaking, including a possible on-the record hearing, and issue regulations and permits.
WCA	NOAA Office of International Affairs and NMFS	Implements United States obligations under the ICRW. NMFS must decide whether to enter into a cooperative agreement with the Makah Tribe for co-management of the gray whale hunts and whether to publish an aboriginal subsistence whaling quota for the Makah's use.
NEPA	Council on Environmental Quality / EPA and NMFS	Requires that an EIS be prepared for every major federal action with the potential to significantly affect the quality of the environment. Consistent with the 9 <sup>th</sup> Circuit decision in <i>Anderson v. Evans</i> NMFS is preparing this EIS and will eventually issue an ROD.
ESA	FWS/NMFS	Requires federal agencies to consult with the FWS or NMFS (depending on species jurisdiction) to ensure that activities authorized, funded, or carried out by federal agencies are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. NMFS may consult internally and FWS for the 16 ESA-listed species and designated killer whale critical habitat in the project area.
Magnuson-Stevens Act	NMFS	Requires federal agencies to consult with NMFS with respect to any action authorized, funded, or undertaken (or proposed to be the same) when the action may adversely affect any essential fish habitat.

**TABLE 1-3. INTERNATIONAL, NATIONAL, STATE, AND TRIBAL TREATIES, LAWS, REGULATIONS, POLICIES, AND PROCESSES THAT MAY BE REQUIRED FOR MAKAH WHALING**

<b>AUTHORITY</b>	<b>OVERSIGHT BODY</b>	<b>DESCRIPTION OF AUTHORITY, NECESSARY ACTION, OR REVIEW/CONSULTATION</b>
National Marine Sanctuary Act	NOAA National Ocean Service, National Marine Sanctuaries Program	Requires federal agencies to consult with NOAA when a proposed action internal or external to any sanctuary is likely to destroy, cause the loss of, or injure a sanctuary resource. NMFS may consult with Sanctuary staff.
Coastal Zone Management Act	Washington Department of Ecology (Ecology)	Requires federal agencies to ensure that activities carried out in or outside the state's coastal zone are consistent with the enforceable policies of approved state management plans, to the maximum extent practicable. NMFS may consult with Ecology.
Migratory Bird Treaty Act and Executive Order 13186 (Migratory Birds)	FWS	Prohibits intentional and unintentional take of migratory birds. NMFS may consult with FWS.
Executive Order 12898 (Environmental Justice)	EPA	Provides for fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.
National Historic Preservation Act	Washington State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO)	Requires federal agencies to consider cultural resources as part of all licensing, permitting, and funding decisions when the proposed action may have an effect on properties included in or eligible for the National Register of Historic Places. NMFS has assessed the potential impacts on registered historic sites in the project area and concludes that consultation is not necessary.
Clean Water Act	EPA; Washington Department of Ecology, and Makah Tribal Council	Establishes standards and regulations by which waters of the state must be managed. NMFS will provide this draft EIS to Ecology for its review.
Makah Whaling Permit	Makah Tribal Council and Makah Whaling Commission	Reviews whaling crew qualifications, identifies whaling crew and vessel participation, and provides other hunt restrictions. The Makah Tribal Council would issue the permit to a whaling captain before any hunt, based on recommendations from the Makah Whaling Commission.

## **1.7 Organization of this EIS**

This EIS is organized in the following categories and chapters:

- Executive Summary
- Table of Contents
- List of Acronyms and Abbreviations
- Glossary
- Chapter 1, Purpose and Need
- Chapter 2, Alternatives
- Chapter 3, Affected Environment
- Chapter 4, Environmental Consequences
- Chapter 5, Cumulative Effects
- References
- List of Preparers and Agencies Consulted
- Distribution List
- Appendix